

# A UNIVERSALIST HISTORY OF THE 1987 PHILIPPINE CONSTITUTION (II)<sup>1</sup>

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“To be non-Orientalist means to accept the continuing tension between the need to universalize our perceptions, analyses, and statements of values and the need to defend their particularist roots against the incursion of the particularist perceptions, analyses, and statements of values coming from others who claim they are putting forward universals. We are required to universalize our particulars and particularize our universals simultaneously and in a kind of constant dialectical exchange, which allows us to find new syntheses that are then of course instantly called into question. It is not an easy game.”

- Immanuel Wallerstein in *EUROPEAN UNIVERSALISM: The Rhetoric of Power*<sup>2</sup>

“Sec.2. The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.

Sec. 11. The State values the dignity of every human person and guarantees full respect for human rights.”

- art. II, secs. 2 and 11, 1987 Philippine Constitution<sup>3</sup>

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**Abstract:** This paper traces universalism --- the vision of international public order built upon rights and values shared by all individuals and peoples --- as a

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<sup>2</sup> The New Press, New York (2006), at pp. 48-49.

<sup>3</sup> CONST., art. II, secs. 2 and 11.

purposely-embedded ideology in the history and evolution of the Philippine Constitution. As the postcolonial and post-dictatorship founding document of the post-modern Philippine polity, the paper contends that 1987 Philippine Constitution enshrines nearly a century of constitutional text and practice which has led towards the present institutionalization of universalist rights-democratic theory in the Philippines' constitutional interpretive canon.

**Key Words:** Philippines, Constitutional History, Constitutional Ideology, Universalism

## **I. UNIVERSALISM 'CONSTITUTIONALIZED': *DESIGN, ORIENTATION, PHILOSOPHY, AND MODES OF ENTRY***

### **1.1. The Universalist Design, Orientation, and Philosophy of the 1987 Philippine Constitution**

Against the previous discussion in Part I of this Article in Volume 10 of the *Historia Constitucional* of ideological currents in the history of Philippine constitutionalism, I now approach the universalist characterization of the 1987 Philippine Constitution from three areas. First, from aspects of its *constitutional design*, I submit that the plethora of institutional checks against the arbitrariness and abusive potential of executive power (e.g. expanded judicial review and rule-making powers of the Supreme Court; impeachment mechanisms and the establishment of special constitutional offices such as the Office of the Ombudsman and the Commission on Human Rights; provision for direct amendment of the Constitution by the people; partylist representation, multiparty system and the prohibition against political dynasties; among others) comprises a set of more direct avenues that empowers *Filipino individuals* to make and legitimate their political judgments in Philippine public order. These institutional checks were purposely devised by the Constitutional Commissioners with the end in view of restoring the constitutional primacy of the Filipino individual through his participation in popular sovereignty.

Second, the *orientation* of the 1987 Constitution shows a strong entrenchment of a rights-culture that appears more universalist in character than in previous constitutional epochs. At the time of drafting of the 1987 Constitution, active Philippine participation in the international legal order ---- as one of the original signatories of the United Nations Charter, and for having ratified all the major human rights treaties and signed the Universal Declaration of Human Rights --- had already informed our conceptions of human rights. As seen from Philippine legal history, the concept of rights inherent to the individual by virtue of his/her basic humanity was a staple in our constitutional rights discourse. Given the atrocities of strongman rule in the Marcos dictatorship, the Constitutional Commissioners were assiduous in ensuring the textualization of ever more numerous individual rights. More importantly, however, the Constitutional

Commissioners had the foresight to recognize that international legal principles on individual human rights were not static normative conceptions. Maintaining the avenue of *incorporation*, (alongside a pacific internationalist foreign policy on use of force) would not only ensure that the full corpus of the Filipino individual's human rights would be accorded constitutional protection, but that the Philippine government would dynamically recognize its evolving responsibilities as a sovereign independent state in the international legal order.

Finally, the *philosophy* of the 1987 Constitution is quaintly described by the Constitutional Commissioners themselves as "pro-life, pro-people, pro-poor, pro-Filipino, and anti-dictatorship". These are aspirations towards realizing (universalist) fundamental human dignity values --- first articulated by the 1899 Malolos Congress, but never motivating constitutional philosophy as strongly until the present 1987 Constitution.

There are many critics of the 1987 Constitution whose arguments swing from a pendulum.<sup>4</sup> On one end (which I prefer to call the 'weak state' objection), critique veers to the perceived excesses of diluting executive power, and the political instability caused or fomented by this constitutional policy. And on the other (the 'mob rule' objection), critique is leveled at 'entrusting' Filipino individual rationality with 'too much democracy' or 'too many rights' that result in exercises detrimental to 'responsible citizenship'. Each critique has its own claims to validity, the evaluation of which would be beyond the scope of this work. Nonetheless, while the universalist response to these critiques could be the subject of separate research altogether, my universalist analysis of various executive particularist acts elsewhere<sup>5</sup> will contribute to a broader understanding of the actual persuasive value of normative assumptions in both objections on the supposed 'weak state' and 'mob rule' tendencies created by the 1987 Constitution.

But we must begin the evaluation of those critiques somewhere. I submit that a keener understanding of our constitutional orientation, design, and philosophy is a useful beginning for appreciating (and responding) to the 'weak state' and 'mob rule' critiques. Thus, the important descriptive result for now is the apparent constitutionalization of the universalist vision of a public law conception that has moved towards cosmopolitan democratic public order --- and ultimately, to

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<sup>4</sup> See Kasuya, Yuko, "Weak Institutions and Strong Movements: The Case of President Estrada's Impeachment and Removal in the Philippines", in JODY C. BAUMGARTNER (ed.), CHECKING EXECUTIVE POWER: Presidential Impeachment in Comparative Perspective, (2003 ed., Praeger); "Lee Sr. says Arroyo's takeover no boost for democracy", Associated Press, January 23, 2001.

<sup>5</sup> See Diane A. Desierto, "Universalist Constitutionalism in the Philippines: Restricting Executive Particularism in the Form of Executive Privilege", *Verfassung und Recht in Übersee/Journal of Law and Politics in Africa, Asia and Latin America*, vol. 1, 2009, at pp. 80-105.

one that is governed by the rationality of fundamental human dignity values. It is a more complete approximation of universalism than previous constitutional epochs.<sup>6</sup>

## **1.2. Universalist Constitutional Design**

The 1987 Constitution introduced various institutional and popular sovereignty mechanisms which Filipino individuals could harness to check the excesses of executive power. As shown in the records of the Constitutional Commission and affirmed by subsequent jurisprudential practice, these mechanisms were purposely detailed in the 1987 Constitution as forms of executive restraint:

### **1.2.1. Expanded power of judicial review**

Article VIII, Section 1 of the 1987 Constitution is a broader formulation of the power of judicial review than in previous Philippine Constitutions:

“Section 1. The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.

Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.”

Unlike the United States Constitution which does not expressly textualize judicial review (first explained in the leading case of *Marbury v. Madison* which elicited the principle of judicial review from “particular phraseology” of the US Constitution that was “supposed to be essential to all written constitutions”), Article VIII, Section 1 of the 1987 Constitution expressly establishes judicial review in the Philippine constitutional system. The Philippine Supreme Court dates the initial exercise of judicial review (through invalidation of constitutionally infirm legislative acts) way back to 1902, stating that the executive and legislative branches effectively acknowledged the power of judicial review in provisions of the Civil Code that mandated consistency of legislative, administrative, and executive acts with the Constitution as a requirement for legality.<sup>7</sup> This provision of the 1987

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<sup>6</sup> As will be seen in the second half of this Article, the constitutional avenues to universalism (e.g. the Incorporation Clause and sources of international law) remain grossly underutilized, if not undertheorized, in our public law discourse.

<sup>7</sup> *Ernesto B. Francisco Jr. et al. v. House of Representatives*, G.R. Nos. 160261, 160262, 160263, 160277, 160292, 160295, 160310, 160318, 160342, 160343, 160360, 160365, 160370, 160376, 160392, 160397, 160403, and 160405, November 10, 2003 (en banc), citing Supreme Court Justice VICENTE V. MENDOZA (Ret.), *SHARING THE PASSION AND ACTION OF OUR TIME* 62-53 (2003); Article 7, Civil Code of the Philippines:

Constitution expanded the *certiorari* jurisdiction of the Supreme Court to include cases of “grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.” As noted by the Court, the rationale for this expansion is attributable to the experience of martial law under the Marcos dictatorship. Former Chief Justice and 1986 Constitutional Commissioner Roberto Concepcion proposed the expansion to avoid repetition of the Court’s experience in failing to resolve crucial human rights cases due to the obstacle of the political question doctrine:

“Fellow Members of this Commission, this is actually a product of our experience during martial law. As a matter of fact, it has some antecedents in the past, but the role of the judiciary during the deposed regime was marred considerably by the circumstance that in a number of cases against the government, which then had no legal defense at all, the solicitor general set up the defense of political questions and got away with it. As a consequence, certain principles concerning particularly the writ of *habeas corpus*, that is, the authority of courts to order the release of political detainees, and other matters related to the operation and effect of martial law failed because the government set up the defense of political question. And the Supreme Court said: ‘Well, since it is political, we have no authority to pass upon it’. The Committee on the Judiciary feels that this was not a proper solution of the questions involved. It did not merely request an encroachment upon the rights of the people, but it, in effect, encouraged further violations thereof during the martial law regime...

Briefly stated, courts of justice determine the limits of power of the agencies and offices of the government as well as those of its officers. In other words, the judiciary is the final arbiter on the question whether or not a branch of government or any of its officials has acted without jurisdiction or in excess of jurisdiction or so capriciously as to constitute an abuse of discretion amounting to excess of jurisdiction or lack of jurisdiction. This is not only a judicial power but a duty to pass judgment on matters of this nature.

This is the background of paragraph 2 of Section 1, which means that the courts cannot hereafter evade the duty to settle

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“Article 7. Laws are repealed only by subsequent ones, and their violation or non-observance shall not be excused by disuse, or custom or practice to the contrary.

When the courts declare a law to be inconsistent with the Constitution, the former shall be void and the latter shall govern.

Administrative or executive acts, orders, and regulations shall be valid only when they are not contrary to the laws or the Constitution.”

matters of this nature, by claiming that such matters constitute a political question.”<sup>8</sup>

Dean Pacifico Agabin notes the counter-majoritarian objection against such an expansion of judicial review in light of the demonstrated history and ideological conservatism of the judiciary in the Philippines, stating that the “pendulum of judicial power [has swung] to the other extreme where the Supreme Court can now sit as ‘superlegislature’ and ‘superpresident’..If there is such a thing as judicial supremacy, this is it.”<sup>9</sup> Article VIII, Section 1 is a constitutional policy to give a ‘heavier weighting of the judicial role in government’, according to former Supreme Court Justice Florentino Feliciano, as a reflection of the “strong expectations in [Philippine] society concerning the ability and willingness of our Court to function as part of the internal balance of power arrangements, and somehow to identify and check or contain the excesses of the political departments.”<sup>10</sup> Former Supreme Court Justice Santiago Kapunan cautioned, however, against the ‘inherently antidemocratic’ nature of the expanded judicial review power.<sup>11</sup>

“This brings me to one more important point: The idea that a norm of constitutional adjudication could be lightly brushed aside on the mere supposition that an issue before the Court is of paramount public concern does great harm to a democratic system which espouses a delicate balance between three separate but coequal branches of government. It is equally of paramount public concern, *certainly paramount to the survival of our democracy*, that acts of the other branches of government are accorded due respect by this Court. Such acts, done within their sphere of competence, have been --- and should always be --- accorded with a presumption of regularity. When such acts are assailed as illegal or unconstitutional, the burden falls upon those who assail these acts to prove that they satisfy the essential norms of constitutional adjudication, because when we finally proceed to declare an act of the executive or legislative branch of our government unconstitutional or illegal, *what we actually accomplish is the thwarting of the will of the elected representatives of the people in the executive or legislative branches of government*. Notwithstanding Article VIII, Section 1 of the Constitution, since the exercise of the power of judicial review by this Court is *inherently antidemocratic*, this Court should exercise a

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<sup>8</sup> Id., citing I Record of the Constitutional Commission 434-436 (1986).

<sup>9</sup> Agabin, Pacifico A., “The Politics of Judicial Review over Executive Action: The Supreme Court and Social Change”, pp. 167-198 in PACIFICO A. AGABIN, UNCONSTITUTIONAL ESSAYS, (1996 ed., University of the Philippines Press).

<sup>10</sup> Feliciano, Florentino P., “The Application of Law: Some Recurring Aspects of the Process of Judicial Review and Decision Making”, 37 Am. J. Juris. 17, (1992), at 29.

<sup>11</sup> See Kilosbayan Inc. et al. v. Teofisto Guingona Jr. et al., G.R. No. 113375, May 5, 1994, (Kapunan, J., dissenting). Emphasis supplied.

becoming modesty in acting as a *revisor* of an act of the executive or legislative branch. The tendency of a frequent and easy resort to the function of judicial review, particularly in areas of economic policy has become lamentably too common as to dwarf the political capacity of the people expressed through their representatives in the policy making branches of the government and to deaden their sense of moral responsibility.”

Clearly, the expansion of judicial review is a constitutional policy that does not immunize our courts from politics. Justice Feliciano affirms that a court fulfills dual functions (‘deciding’ as opposed to ‘law-making’) in the three-pronged process of applying legal norms to any given controversy before it: 1) determination of the operative facts; 2) determination of the applicable legal or normative prescriptions; and 3) relating the applicable prescriptions to the operative facts.<sup>12</sup> Inevitably, the elasticity of the Court’s use of its power of judicial review under the ‘grave abuse of discretion’ standard in Article VIII, Section 1 of the 1987 Constitution would depend to a significant extent on the rationality, predispositions, and value judgments of the majority of the members of the Court.<sup>13</sup>

Since the promulgation of the 1987 Constitution, Filipino individuals and citizens’ groups have sought recourse to the expanded judicial review power of the Supreme Court to directly file petitions for writs to annul, enjoin, or prohibit governmental acts that violate fundamental human rights and civil liberties, and/or to compel governmental conduct towards observance of such rights and liberties. In the words of the Court, this expansion of judicial power “is an antidote to and a safety net against whimsical, despotic, and oppressive exercise of governmental power.”<sup>14</sup> As such, the expansion of the Court’s power of judicial review contemplates any governmental deprivation of rights within the penumbra of the individual’s constitutionally-guaranteed rights to life, liberty, and due process.<sup>15</sup>

Over the last two decades since the promulgation the 1987 Constitution, the Court has issued writs and/or resolved cases on fundamental civil liberties and basic constitutional rights guarantees using its expanded judicial review power, including, among others: 1) nullifying administrative rules and regulations issued by the executive department that contravened the constitutionally-mandated

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<sup>12</sup> Id., at 34-36.

<sup>13</sup> The Supreme Court admitted the elasticity of the ‘grave abuse of discretion’ standard, citing Justice Isagani A. Cruz, in the landmark anti-logging case of *Oposa v. Factoran*, G.R. No. 101083, July 30, 1993, which involved a Petition hinged on the alleged existence of an ‘intergenerational’ right to a healthful and balanced ecology, which right the Court held was sufficient to vest standing on petitioners on behalf of minors and generations yet unborn.

<sup>14</sup> *Sabdullah T. Macabago v. Commission on Elections et al.*, G.R. No. 152163, November 18, 2002.

<sup>15</sup> See *Jurry Andal et al. v. People of the Philippines, et al.*, G.R. Nos. 138268-69, May 26, 1999 (en banc).

agrarian reform program;<sup>16</sup> 2) affirming the constitutional right to a fair and a speedy trial;<sup>17</sup> 3) affirming a lower court judgment finding the government's use of arrest, detention, and/or deportation orders to be illegal and arbitrary;<sup>18</sup> 4) enjoining the military and police's conduct of warrantless arrests and searches, 'aerial target zonings' or 'saturation drives' in areas where alleged subversives were supposedly hiding;<sup>19</sup> 5) declaring search warrants defective and the ensuing seizure of private properties to be illegal;<sup>20</sup> 6) acquitting a person whose conviction for murder was based largely on an inadmissible extrajudicial confession (obtained without the presence of counsel);<sup>21</sup> 7) upholding the dismissal of a criminal charge on the basis of the constitutional right against double jeopardy;<sup>22</sup> 8) acquittal of a public officer due to a violation of the constitutional right of the accused to a speedy disposition of her case;<sup>23</sup> 9) prohibiting the compelled donation of print media space to the Commission on Elections without payment of just compensation;<sup>24</sup> and 10) prohibiting governmental restrictions on the publication of election survey results for unconstitutionally abridging the freedom of speech, expression, and the press.<sup>25</sup>

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<sup>16</sup> Luz Farms v. Secretary of the Department of Agrarian Reform, G.R. No. 86889, December 4, 1990 (en banc).

<sup>17</sup> Lisandro Abadia et al. v. Court of Appeals et al., G.R. No. 105597, September 23, 1994 (en banc).

<sup>18</sup> Andrea D. Domingo v. Herbert Markus Emil Scheer, G.R. No. 154745, January 29, 2004.

<sup>19</sup> Eddie Guazon et al. v. Renato De Villa et al., G.R. No. 80508, January 30, 1990; *See among others* People of the Philippines v. Melly Sarap, G.R. No. 132165, March 26, 2003; People of the Philippines v. Noel P. Tudtud, et al., G.R. No. 144037, September 26, 2003; Rudy Caballes v. Court of Appeals et al., G.R. No. 136292, January 15, 2002; People of the Philippines v. Nasario Molina et al., G.R. No. 133917, February 19, 2001; People of the Philippines v. Rufino Gamer, G.R. No. 115984, February 29, 2000.

<sup>20</sup> Republic of the Philippines v. Sandiganbayan et al., G.R. No. 104768, July 21, 2003. *See among others* People of the Philippines v. Loreto Salangga et al., G.R. No. 100910, July 25, 1994; People of the Philippines v. Danilo Q. Simbahon, G.R. No. 132371, April 9, 2003.

<sup>21</sup> People of the Philippines v. Elizar Tomaquin, G.R. No. 133188, July 23, 2004. *See among others* People of the Philippines v. Joel Janson, et al., G.R. No. 125938, April 4, 2003; People of the Philippines v. Roldan A. Ochate, G.R. No. 127154, July 30, 2002 (en banc); People of the Philippines v. Sherjohn Arondain, G.R. Nos. 131864-65, September 27, 2001 (en banc); People of the Philippines v. Domingo R. Muleta, G.R. No. 130189, June 25, 1999.

<sup>22</sup> People v. Acelo Verra, G.R. No. 134732, May 29, 2002.

<sup>23</sup> Imelda R. Marcos v. Sandiganbayan, et al., G.R. No. 126995, October 6, 1998 (en banc).

<sup>24</sup> Philippine Press Institute Inc. v. Commission on Elections, G.R. No. 119694, May 22, 1995 (en banc).

<sup>25</sup> Social Weather Stations Inc. et al. v. Commission on Elections, G.R. No. 147571, May 5, 2001 (en banc). *See also* In Re Emil (Emiliano) P. Jurado Ex Rel: Philippine Long Distance Telephone Company (PLDT) per its First Vice-President, Mr. Vicente R. Samson, A.M. No. 93-2-037 SC, April 6, 1995 (en banc).



### 1.2.2. Expanded rule-making powers of the Supreme Court

Article VIII, Section 5(5) of the 1987 Constitution vests the Supreme Court with the authority to promulgate rules ‘concerning the protection and enforcement of constitutional rights’:

“Sec. 5. The Supreme Court shall have the following powers:

....(5) Promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts, the admission to the practice of law, the Integrated Bar, and legal assistance to the underprivileged. Such rules shall provide a simplified and inexpensive procedure for the speedy disposition of cases, shall be uniform for all courts of the same grade, and shall not diminish, increase, or modify substantive rights. Rules of procedure of special courts and quasi-judicial bodies shall remain effective unless disapproved by the Supreme Court.”

The Supreme Court’s authority to promulgate rules ‘concerning the protection and enforcement of constitutional rights’ is a formulation unique to the 1987 Constitution, nowhere found in the rule-making power of the Court as expressed in the 1973 Constitution and the 1935 Constitution.<sup>26</sup> Philippine Supreme Court Chief Justice Reynato Puno has publicly declared that the framers of the 1987 Constitution purposely expanded the Court’s rule-making power in view of the fundamental importance of protecting individuals’ constitutionally-guaranteed rights:

“I respectfully submit further that the framers of the 1987 Constitution were gifted with a foresight that allowed them to see that the dark forces of human rights violators would revisit our country and wreak havoc on the rights of our people. With this all-seeing eye, they embedded in our 1987 Constitution a new power and vested it on our Supreme Court – the power to promulgate rules to protect the constitutional rights of our people. This is a radical departure from our 1935 and 1972 Constitutions, for the power to promulgate rules or laws to protect the constitutional rights of our people is essentially a legislative power, and yet it was given to the judiciary, more specifically to the Supreme Court. If this is disconcerting to foreign constitutional experts who embrace the tenet that separation of powers is the cornerstone of democracy, it is not so to Filipinos who survived the authoritarian years, 1971 to 1986. Those were the winter years of human rights in the Philippines. They taught us the lesson that in the fight for human

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<sup>26</sup> See 1973 CONST., art. X, sec. 5(5); 1935 CONST., art. VIII, sec. 13.

rights, it is the judiciary that is our last bulwark of defense; hence, the people entrusted to the Supreme Court this right to promulgate rules protecting their constitutional rights.”<sup>27</sup>

The foregoing interpretation of the Court’s expanded rule-making power under the 1987 Constitution appears to have been adopted by the Court itself outside of specific **jurisprudential** pronouncement. There is no case, to date, that interprets the Constitutional intent behind the expansion of the Court’s rule-making power under the 1987 Constitution. However, when the Court promulgated the Rule on the *Writ of Amparo*<sup>28</sup> in October 2007, it also authorized the release of the *Annotation to the Writ of Amparo*.<sup>29</sup> In this *Annotation*, the Committee on Revision of the Rules of Court stated in no uncertain terms that the Supreme Court was purposely vested with this ‘additional power’ to protect and enforce rights guaranteed by the 1987 Constitution:

“The 1987 Constitution enhanced the protection of human rights by giving the Supreme Court the power to ‘[p]romulgate rules concerning the protection and enforcement of constitutional rights...’ This rule-making power unique to the present Constitution, is the result of our experience under the dark years of the martial law regime. Heretofore, the protection of constitutional rights was principally lodged with Congress through the enactment of laws and their implementing rules and regulation. The 1987 Constitution, however, gave the Supreme Court the additional power to promulgate rules to protect and enforce rights guaranteed by the fundamental law of the land.

In light of the prevalence of extralegal killing and enforced disappearances, the Supreme Court resolved to exercise for the first time its power to promulgate rules to protect our people’s constitutional rights. Its Committee on Revision of the Rules of Court agreed that the writ of *amparo* should not be as comprehensive and all-encompassing as the ones found in some American countries, especially Mexico. xxx The Committee decided that in our jurisdiction, this writ of *amparo* should be allowed to evolve through

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<sup>27</sup> Puno, Reynato S., “No Turning Back on Human Rights”, speech delivered on Aug. 25 2007 at Silliman University, Dumaguete City, Philippines. Full text at: <http://ia341243.us.archive.org/3/items/TextOfChiefJusticeReynatoPunoSillimanSpeech/PunoOnHumanRights.doc> (last visited 5 May 2008).

<sup>28</sup> The Writ of Amparo is a form of judicial relief “available to any person whose right to life, liberty and security is violated or threatened with violation by an unlawful act or omission of a public official or employee, or of a private individual or entity”, and applies to “extralegal killings and enforced disappearances or threats thereof”. See full text at [http://www.supremecourt.gov.ph/RULE\\_AMPARO.pdf](http://www.supremecourt.gov.ph/RULE_AMPARO.pdf) (last visited 15 May 2008).

<sup>29</sup> Full text at [http://www.supremecourt.gov.ph/Annotation\\_amparo.pdf](http://www.supremecourt.gov.ph/Annotation_amparo.pdf) (last visited 5 May 2008).

time and jurisprudence and through substantive laws as they may be promulgated by Congress.”<sup>30</sup>

Significantly, the *Annotation* does not refer to any portion of the Record of the 1986 Constitutional Commission that explains the expansion of the Court’s rule-making power. Given the Court’s pronouncement in this *Annotation*, however, it appears unlikely that the Court would countermand its own interpretation of the expansion of its rule-making power under the 1987 Constitution. This interpretation of the Court’s expanded rule-making power could similarly explain the Court’s promulgation of the Rule on the *Writ of Habeas Data* in January 2008.<sup>31</sup>

### 1.2.3. Provisions for Impeachment of Public Officers

Article XI of the 1987 Constitution amplifies, in greater detail than previous constitutions, the Filipino citizen’s direct remedy of impeachment of high constitutional officers such as the President, the Vice-President, the members of the Supreme Court, the members of the Constitutional Commissions, and the Ombudsman:

“Section 1. Public office is a public trust. Public officers and employees must at all times be accountable to the people, serve them with utmost responsibility, integrity, loyalty, and efficiency, act with patriotism and justice, and lead modest lives.

Section 2. The President, the Vice-President, the Members of the Supreme Court, the Members of the Constitutional Commissions, and the Ombudsman may be removed from office, on impeachment.

Section 3. (1) The House of Representatives shall have the exclusive power to initiate all cases of impeachment.

(2) A verified complaint for impeachment may be filed by *any member of the House of Representatives or by any citizen upon a resolution of endorsement by any Member thereof*, which shall be included in the Order of Business within ten session days, and referred to the proper Committee within three session days thereafter. The Committee, after hearing, and by a majority vote of all its Members, shall submit its report to the House within sixty session days from such referral, together with the corresponding resolution. The resolution shall be calendared for consideration by the House within ten session days from receipt thereof.

(3) A vote of at least one-third of all the members of the House shall be necessary either to affirm a favorable resolution with the Articles of

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<sup>30</sup> Id., at pp. 2-3.

<sup>31</sup> See A.M. No. 08-1-16-SC (“Rule on the Writ of Habeas Data”). Full text at: <http://www.supremecourt.gov.ph/rulesofcourt/2008/jan/A.M.No.08-1-16-SC.pdf> (last visited 5 May 2008).

Impeachment of the Committee, or overrule its contrary resolution. The vote of each member shall be recorded.

(4) In case the verified complaint or resolution of impeachment is filed by at least one-third of all the Members of the House, the same shall constitute the Articles of Impeachment, and trial by the Senate shall forthwith proceed.

(5) No impeachment proceeding shall be initiated against the same official more than once within a period of one year.

(6) The Senate shall have the sole power to try and decide all cases of impeachment. When sitting for that purpose, the Senators shall be on oath or affirmation. When the President of the Philippines is on trial, the Chief Justice of the Supreme Court shall preside, but shall not vote. No person shall be convicted without the concurrence of two-thirds of all the Members of the Senate.

(7) Judgment in cases of impeachment shall not extend further than removal from office and disqualification to hold any office under the Republic of the Philippines, but the party convicted shall nevertheless be liable and subject to prosecution, trial, and punishment according to law.

(8) The Congress shall promulgate its rules on impeachment to effectively carry out the purpose of this section.<sup>32</sup>

In British legal history, impeachment was a method first used by the House of Commons in 1376 to 'control royal ministers through a judicial process conducted outside the regular royal courts', 'in order to prosecute ministers of state whom the king refused to prosecute'.<sup>33</sup> (This was axiomatic for the English constitutional structure where the Prime Minister and his cabinet were accountable to the sovereignty of Parliament.) The English device of impeachment influenced the framers of the US Constitution, which in turn influenced the drafting of the initial constitutional provisions on impeachment under Article IX of the 1935 Philippine Constitution. The impeachment process, recently tested against former President Joseph Estrada, has never been pursued to its conclusion or final termination.

The traditional concept of limiting sovereign power 'outside' of judicial intervention would, however, be radicalized in the 1987 Philippine Constitution. While impeachment is traditionally conceptualized as a political act,<sup>34</sup> in the

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<sup>32</sup> CONST., art. XI, secs. 1-3(8). Emphasis supplied. See also Rules of Procedure in Impeachment Proceedings (House Impeachment Rules), 12<sup>th</sup> Congress, November 28, 2001; Rules of Procedure on Impeachment Trials in the Senate of the Philippines, Senate Resolution No. 890, at <http://www.chanrobles.com/legal11impeachmentrules.htm> (last visited 15 May 2008); TUPAZ, ANTONIO R. and A. EDEL C.F. TUPAZ, FUNDAMENTALS ON IMPEACHMENT, (2001 ed., Central Lawbook Publishing, Quezon City).

<sup>33</sup> Seidman, Guy I., "The Origins of Accountability: Everything I Know About the Sovereign's Immunity, I Learned from King Henry III", 49 St. Louis U. L.J. 393 (Winter 2005), at 446-449.

<sup>34</sup> JODY C. BAUMGARTNER and NAOKO KADA (eds.), CHECKING EXECUTIVE POWER: PRESIDENTIAL IMPEACHMENT IN COMPARATIVE PERSPECTIVE, (2003 ed., Praeger); See Hull, N.E.H. and Peter Charles Hoffer, "Historians and the Impeachment Imbroglia: In Search of a Serviceable History", 31 Rutgers L.J. 473 (Winter 2000).

Philippines under the 1987 Constitution, the political origins and nature of the impeachment process could still be subject to judicial review. According to the Supreme Court, this peculiarity was purposely intended by the 1986 Constitutional Commission in view of the expansion of the Supreme Court's power of judicial review. In a 2003 ruling involving a second impeachment complaint filed against the Chief Justice of the Supreme Court within the one-year bar in the 1987 Constitution,<sup>35</sup> the Philippine Supreme Court expressly declared that impeachment proceedings are within the scope of its expanded power of judicial review under the 1987 Constitution.<sup>36</sup> The Court stated that the 1987 Constitution "did not intend to leave the matter of impeachment to the sole discretion of Congress. Instead, it provided for certain well-defined limits...through the power of judicial review." Impeachment could not be deemed as a purely political action, unlike in the United States legal tradition since it was not a 'truly political question'. The Court held that the test of the existence of a 'truly political question' which would prevent it from exercising judicial review "lies in the answer to the question of whether there are constitutionally imposed limits on powers or functions conferred upon political bodies. If there are, then our courts are duty-bound to examine whether the branch or instrumentality of the government properly acted within such limits."<sup>37</sup>

#### **1.2.4. Special Constitutional Offices such as the Office of the Ombudsman and the Commission on Human Rights**

The 1987 Constitution created two special constitutional offices to: 1) give Filipino individuals additional modes of direct recourse in case of violations of their fundamental rights; and 2) operationalize the constitutional policy on transparency of government transactions and accountability of public officers. The Office of the Ombudsman, dubbed as "protector of the people" under the 1987 Constitution, designed as a powerful independent constitutional office, with vast powers, including the authority to prosecute and administratively discipline public officers, and recommend the impeachment of constitutional officers. On the other hand, the Commission on Human Rights was created as an independent constitutional

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<sup>35</sup> Based on its close interpretation of the Constitutional text and intent from 1986 Constitutional Commission records, the Court held that the second impeachment complaint filed by two legislators against the Chief Justice violated the constitutional prohibition against the initiation of impeachment proceedings against the same officer within a one-year period.

<sup>36</sup> Id.

<sup>37</sup> Id. To address the concern of the political branches against arbitrary encroachments by the judiciary, the Court stated that it had itself developed guidelines in the exercise of its expanded power of judicial review: 1) existence of an actual case or controversy calling for the exercise of judicial power; 2) the person challenging the act must have standing to challenge; he must have a personal and substantial interest in the case such that he has sustained, or will sustain, direct injury as a result of its enforcement; 3) the question of constitutionality must be raised at the earliest possible opportunity; 4) the issue of constitutionality must be the very *lis mota* of the case.

office to fulfill monitoring, fact-finding, and reportorial functions in relation to human rights violations in the Philippines.<sup>38</sup>

“Article XI  
ACCOUNTABILITY OF PUBLIC OFFICERS

...Sec.5. There is hereby created the independent Office of the Ombudsman, composed of the Ombudsman to be known as Tanodbayan, one overall Deputy and at least one Deputy each for Luzon, Visayas, and Mindanao. A separate Deputy for the military establishment may likewise be appointed.

Sec. 6. The officials and employees of the Office of the Ombudsman, other than the Deputies, shall be appointed by the Ombudsman according to the Civil Service Law.

Sec. 7. The existing Tanodbayan shall hereafter be known as the Office of the Special Prosecutor. It shall continue to function and exercise its powers as now or hereafter may be provided by law, except those conferred on the Office of the Ombudsman created under this Constitution.

Sec.8. The Ombudsman and his Deputies shall be natural-born citizens of the Philippines, and at the time of their appointment, at least forty years old, of recognized probity and independence, and members of the Philippine Bar, and must not have been candidates for any elective office in the immediately preceding election. The Ombudsman must have for ten years or more been a judge or engaged in the practice of law in the Philippines.

During their tenure, they shall be subject to the same disqualifications and prohibitions as provided for in Section 2 of Article IX-A of this Constitution.

Sec.9. The Ombudsman and his Deputies shall be appointed by the President from a list of at least six nominees prepared by the Judicial and Bar Council, and from a list of three nominees for every vacancy thereafter. Such appointments shall require no confirmation. All vacancies shall be filled within three months after they occur.

Sec. 10. The Ombudsman and his Deputies shall have the rank of Chairman and Members, respectively, of the Constitutional Commissions, and they shall receive the same salary, which shall not be decreased during their term of office.

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<sup>38</sup> CONST., art. XI, secs. 5-14; art. XIII, secs. 17-19.

Sec. 11. The Ombudsman and his Deputies shall serve for a term of seven years without reappointment. They shall not be qualified to run for any office in the election immediately succeeding their cessation from office.

Sec. 12. The Ombudsman and his Deputies, as protectors of the people, shall act promptly on complaints filed in any form or manner against public officials or employees of the Government, or any subdivision, agency or instrumentality thereof, including government-owned or controlled corporations, and shall, in appropriate cases, notify the complainants of the action taken and the result thereof.

Sec. 13. The Office of the Ombudsman shall have the following powers, functions, and duties:

- (1) Investigate on its own, or upon complaint by any person, any act or omission of any public official, employee, office or agency, when such act or omission appears to be illegal, unjust, improper, or inefficient.
- (2) Direct, upon complaint or at its own instance, any public official or employee of the Government, or any subdivision, agency, or instrumentality thereof, as well as of any government-owned or controlled corporation with original charter, to perform and expedite any act or duty required by law, or to stop, prevent, and correct any abuse or impropriety in the performance of duties.
- (3) Direct the officer concerned to take appropriate action against a public official or employee at fault, and recommend his removal, suspension, demotion, fine, censure, or prosecution, and ensure compliance therewith.
- (4) Direct the officer concerned, in any appropriate case, and subject to such limitations as may be provided by law, to furnish it with copies of documents relating to contracts or transactions entered into by his office involving the disbursement or use of public funds or properties, and report any irregularity to the Commission on Audit for appropriate action.
- (5) Request any government agency for assistance and information necessary in the discharge of its responsibilities and to examine, if necessary, pertinent records and documents.
- (6) Publicize matters covered by its investigation when circumstances so warrant and with due prudence.

- (7) Determine the cause of inefficiency, red tape, mismanagement, fraud, and corruption in the Government and make recommendations for their elimination and the observance of high standards of ethics and efficiency.
- (8) Promulgate its rules of procedure and exercise such other powers or perform such functions or duties as may be provided by law.

Sec. 14. The Office of the Ombudsman shall enjoy fiscal autonomy. Its approved annual appropriations shall be automatically and regularly released....

### Article XIII

#### SOCIAL JUSTICE AND HUMAN RIGHTS

...Sec. 17. (1) There is hereby created an independent office called the Commission on Human Rights.

(2) The Commission shall be composed of a Chairman and four Members who must be natural-born citizens of the Philippines and a majority of whom shall be members of the Bar. The term of office and other qualifications and disabilities of the Members of the Commission shall be provided by law.

(3) Until this Commission is constituted, the existing Presidential Committee on Human Rights shall continue to exercise its present functions and powers.

(4) The approved annual appropriations of the Commission shall be automatically and regularly released.

Sec.18. The Commission on Human Rights shall have the following powers and functions:

(1) Investigate, on its own or on complaint by any party, all forms of human rights violations involving civil and political rights;

(2) Adopt its operational guidelines and rules of procedures, and cite for contempt for violations thereof in accordance with the Rules of Court;

(3) Provide appropriate legal measures for the protection of human rights of all persons within the Philippines, as well as Filipinos residing abroad, and provide for preventive measures and legal aid services to the underprivileged whose human rights have been violated or need protection;

(4) Exercise visitorial powers over jails, prisons, or detention facilities;

(5) Establish a continuing program of research, education, and information to enhance respect for the primacy of human rights;



(6) Recommend to the Congress effective measures to promote human rights and to provide for compensation to victims of violations of human rights or their families;

(7) Monitor the Philippine Government's compliance with international treaty obligations on human rights;

(8) Grant immunity from prosecution to any person whose testimony or whose possession of documents or other evidence is necessary or convenient to determine the truth in any investigation conducted by it or under its authority;

(9) Request the assistance of any department, bureau, office, or agency in the performance of its functions;

(10) Appointment of its officers and employees in accordance with law; and

(11) Perform such other duties and functions as may be provided by law.

Sec. 19. The Congress may provide for other cases of violations of human rights that should fall within the authority of the Commission, taking into account its recommendations."

The concept of an Ombudsman owes its origins to Sweden's 1809 Constitution.<sup>39</sup> The Swedish Ombudsman was an institution thought to be derived from Roman antecedents (e.g. the *tribuni plebis* of ancient Rome). While the Office of the Ombudsman appeared 'antagonistic' to the strict doctrine of separation of powers, the Swedish Ombudsman served the interests of the 'Estates of the Realm' only to the extent that "as an officer elected by Parliament, he could institute proceedings against officials and judges; but the trial of these actions was to be before the general courts, which were largely independent of Parliament."<sup>40</sup> The Swedish Ombudsman was "part of the network of controls which include the right of citizens to have access to all public documents within certain statutory exceptions designed for the protection of public and private information which is rightly secret, the power of private individuals to institute proceedings against officials for faults committed in the exercise of their duties, and the concomitant personal liability of officials for damages in cases where prejudice to the interests of private citizens has resulted from dereliction of duty."<sup>41</sup>

The Philippine Ombudsman, however, is intended by the 1986 Constitutional Commission to be a stronger and more independent constitutional check against governmental power than the classical Swedish conception. There are only two

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<sup>39</sup> See Carlota, Salvador T., "The Ombudsman: Its Effectivity and Visibility Amidst Bureaucratic Abuse and Irregularity", 65 Phil. L. J. 12, (1990).

<sup>40</sup> Jägerskiöld, Stig, "The Swedish Ombudsman", 109 Univ. Penn. L. Rev. 8, 1077-1099 (Jun., 1961), at 1079.

<sup>41</sup> Id. at 1080. See also Bull, Thomas, "The Original Ombudsman: Blueprint in Need of Revision or a Concept with More to Offer?", 6 Eur. Pub. L. 3, at 334-344 (1995).

institutions explicitly designated under the 1987 Constitution as 'protectors of the people' --- the Office of the Ombudsman, on the one hand, and the Armed Forces of the Philippines, on the other.<sup>42</sup> As records of the 1986 Constitutional Commission show, this is not coincidental phraseology.<sup>43</sup>

"MR. MONSOD

Madam President, perhaps it might be helpful if we give the spirit and intendment of the Committee. What we wanted to avoid is the situation where it deteriorates into a prosecution arm. **We wanted to give the idea of the Ombudsman a chance, with prestige and persuasive powers, and also a chance to really function as a champion of the citizen.**

However, we do not want to foreclose the possibility that in the future, the Assembly, as it may see fit, may have to give additional powers to the Ombudsman; we want to give the concept of a pure Ombudsman a chance under the Constitution.

MR. RODRIGO:

Madam President, what I am worried about is if we create a constitutional body which has neither punitive nor prosecutory powers but only persuasive powers, we might be raising the hopes of our people too much and then disappoint them.

MR. MONSOD:

I agree with the Commissioner.

MR. RODRIGO:

Anyway, since we state that the powers of the Ombudsman can later on be implemented by the legislature, why not leave this to the legislature?

MR. MONSOD.

Yes, because we want to avoid what happened in 1973. I read the committee report which recommended the approval of the 27 resolutions for the creation of the office of the Ombudsman, but notwithstanding the explicit purpose enunciated in that report, the implementing law --- the last one,

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<sup>42</sup> CONST., art. XI, sec. 12; art. II, sec. 3.

<sup>43</sup> Ronaldo P. Ledesma v. Court of Appeals et al., G.R. No. 161629, July 29, 2005, *citing* Camanag v. Guerrero, G.R. No. 121017, February 17, 1997, *citing* II Record of the Constitutional Commission 268 (1986).

P.D. No. 1630 --- did not follow the main thrust; instead it created the Tanodbayan...

MR. MONSOD (reacting to statements of Commissioner Blas Ople):

May we just state that perhaps the honorable Commissioner has looked at it in too much of an absolutist position. **The Ombudsman is seen as a civil advocate or a champion of citizens against the bureaucracy**, not against the President. On one hand, we are told he has no teeth and he lacks other things. On the other hand, there is the interpretation that he is a competitor to the President, as if he is being brought up to the same level as the President.

With respect to the argument that he is a toothless animal, we would like to say that we are promoting the concept in its form at the present, but we are also saying that he can exercise such powers and functions as may be provided by law in accordance with the thinking of Commissioner Rodrigo. We did not think that at this time we should prescribe this, but we leave it up to Congress at some future time if it feels that it may need to designate what powers the Ombudsman may need in order that he be more effective. This is not foreclosed.”

The Philippine Legislature magnified the powers of the Ombudsman in Republic Act No. 6770 (‘Ombudsman Act of 1989’) which explicitly provided the Ombudsman with prosecutorial functions. Reading the 1987 Constitution along with the Ombudsman Act of 1989, the Supreme Court describes the Philippine Ombudsman as “depart[ing] from the classical Ombudsman model whose function is merely to receive and process the people’s complaints against corrupt and abusive government personnel. The Philippine Ombudsman, as protector of the people, is armed with the power to prosecute erring public officers and employees, giving him an active role in the enforcement of laws on anti-graft and corrupt practices and such other offenses that may be committed by such officers and employees. The legislature has vested him with broad powers to enable him to implement his own actions...”<sup>44</sup>

Much of the body of jurisprudence that has evolved from the creation of the Office of the Ombudsman under the 1987 Constitution involves questions on the scope of the Ombudsman’s administrative authority and prosecutorial jurisdiction over public officers at various levels of the Philippine government hierarchy.<sup>45</sup> (The

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<sup>44</sup> George Uy v. Sandiganbayan, et al., G.R. Nos. 105965-70, March 20, 2001 (en banc). the Court noted dictator Ferdinand Marcos’ attempt to create the Ombudsman during Martial Law rule, but whose prosecutorial functions were supervised by Marcos’ own Secretary of Justice.

<sup>45</sup> For (re)statements of the Ombudsman’s administrative disciplinary authority, *see among others* Erlinda F. Santos v. Ma. Carest A. Rasalan, G.R. No. 155749, February 8, 2007; Office of the Ombudsman v. Heidi M. Estandarte et al., G.R. No. 168670, April 13, 2007; Corazon C. Balastro v. Nestor Junio et al., G.R. No. 154678, July 17, 2007. For clarifications on the Ombudsman’s prosecutorial powers, *see among others*

most high-profile of which is the criminal prosecution of former President Joseph Estrada, made possible after the Supreme Court declared him to have already ‘constructively resigned’ from office.<sup>46</sup>) Despite its expanded judicial review powers, however, the Supreme Court has generally exercised a voluntary ‘policy of non-interference’ in the Ombudsman’s constitutionally-mandated investigatory and prosecutorial powers, unless for ‘good and compelling reasons’. The Court explains its policy as a mode of ‘respect’ for the constitutionally-mandated initiative and independence inherent in the Ombudsman, who, ‘beholden to no one, acts as the champion of the people and the preserver of integrity in the public service’.<sup>47</sup> This is unique in light of consistent judicial opinion that the Ombudsman is an institution constitutionally designed precisely to give individuals direct recourse and remedial means against abusive excesses of governmental power.<sup>48</sup>

In contrast, however, the Supreme Court’s judicial interpretation has served to restrict the powers and authority of the Commission on Human Rights. In *Isidro Cariño et al. v. Commission on Human Rights et al.*, the unanimous Court clarified that the Commission’s power to ‘investigate all forms of human rights violations involving civil and political rights’ did not extend to adjudication or resolution of cases involving human rights violations.<sup>49</sup> This reduced the Commission to a fact-finding body, with no authority to hear and decide cases whether in a quasi-judicial or judicial capacity. The Court also recently qualified the scope of the Commission’s fiscal autonomy only to “the privilege of having its approved annual appropriations released automatically and regularly”, withholding from it the broad fiscal autonomy enjoyed by the Judiciary, Constitutional Commissions, and the Office of the Ombudsman.<sup>50</sup>

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<sup>46</sup> Joseph E. Estrada v. Aniano Desierto in his capacity as Ombudsman, et al., G.R. Nos. 146710-15, and Joseph E. Estrada v. Gloria Macapagal-Arroyo, G.R. No. 146738, March 2, 2001 (en banc); Joseph E. Estrada v. Aniano Desierto et al., G.R. Nos. 146710-15, Joseph E. Estrada v. Gloria Macapagal-Arroyo, G.R. No. 146738, April 3, 2001 (en banc); See Joseph E. Estrada v. Aniano A. Desierto et al., G.R. No. 156160, December 9, 2004 (en banc).

<sup>47</sup> Presidential Ad-Hoc Fact Finding Committee on Behest Loans v. Ombudsman Aniano Desierto et al., G.R. No. 136192, August 14, 2001 (en banc).

<sup>48</sup> See among others Jose M. Galaro v. Office of the Ombudsman (Mindanao) et al., G.R. No. 166797, July 10, 2007; Office of the Ombudsman v. Court of Appeals et al., G.R. No. 160675, June 16, 2006; Gregorio B. Honasan II v. Panel of Investigating Prosecutors of the Department of Justice et al., G.R. No. 159747, April 13, 2004; Manuel C. Roxas et al. v. Conrado M. Vasquez et al., G.R. No. 114944, June 19, 2001; Presidential Ad Hoc Fact-Finding Committee on Behest Loans v. Aniano A. Desierto et al., G.R. No. 130140, October 25, 1999; Leonila Garcia-Rueda v. Wilfred L. Pascasio, et al., G.R. No. 118141, September 5, 1997; Amor D. Deloso v. Manuel C. Domingo et al., G.R. No. 90591, November 21, 1990.

<sup>49</sup> Isidro Cariño et al. v. Commission on Human Rights et al., G.R. No. 96681, December 2, 1991 (en banc).

<sup>50</sup> Commission on Human Rights Employees’ Association v. Commission on Human Rights, G.R. No. 155336, July 21, 2006.

### 1.2.5. Multiparty and Party-list systems in Philippine elections

Abjuring political despotism under the Marcos regime, the 1987 Constitution prescribes a free and open electoral party system. It abolished the two-party system under the 1935 and 1973 Constitutions that supposedly entrenched political dynasties along bipartisan lines. Alongside the multiparty system, the 1986 Constitutional Commission also created a *party-list* system to ensure representation of economically and socially disadvantaged sectors in the Philippine Congress, and as a means to counteract the proliferation of political dynasties.<sup>51</sup> Article II, Section 26; Article VI, Sections 5(1) and 5(2); and Article IX-C, Sections 6, 7, and 8 of the 1987 Constitution jointly reflect the Constitutional policy towards wide and open representation, to wit:

#### “ARTICLE II

#### DECLARATION OF PRINCIPLES AND STATE POLICIES

Sec. 26. The State shall guarantee equal access to opportunities for public service, and prohibit political dynasties as may be defined by law.

#### ARTICLE VI

#### LEGISLATIVE DEPARTMENT

Sec. 5(1). The House of Representatives shall be composed of not more than two hundred and fifty members, unless otherwise fixed by law, who shall be elected from legislative districts apportioned among the provinces, cities, and the Metropolitan Manila area in accordance with the number of their respective inhabitants, and on the basis of a uniform and progressive ratio, and those who, as provided by law, shall be elected

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<sup>51</sup> II Record of the Constitutional Commission 256. See Victorino Dennis M. Socrates v. Commission on Elections et al., G.R. Nos. 154512, 154683, 155083-84, November 12, 2002, (Puno, J., concurring opinion), *citing* Constitutional Commissioner Blas M. Ople:

“I think the veterans of the Senate and of the House of Representatives here will say that simply getting nominated on a party ticket is a very poor assurance that the people will return them to the Senate or to the House of Representatives. There are many casualties along the way of those who want to return to their office, and it is the people's decision that matters....

...I think we already have succeeded in striking a balance of policies, so that the structures, about which Commissioner Garcia expressed a very legitimate concern, could henceforth develop to redistribute opportunities, both in terms of political and economic power, to the great majority of the people, because very soon, we will also discuss the multiparty system. We have unshackled Philippine politics from the two-party system, which really was the most critical support for the perpetuation of political dynasties in the Philippines. That is quite a victory, but at the same time, let us not despise the role of political parties. The strength of democracy will depend a lot on how strong our democratic parties are, and a splintering of all these parties so that we fall back on, let us say, nontraditional parties entirely will mean a great loss to the vitality and resiliency of our democracy...”

through a party-list system of registered national, regional, and sectoral parties or organizations.

(2) The party-list representatives shall constitute twenty per centum of the total number of representatives including those under the party list. For three consecutive terms after the ratification of this Constitution, one-half of the seats allocated to party-list representatives shall be filled, as provided by law, by selection or election from the labor, peasant, urban poor, indigenous cultural communities, women, youth, and such other sectors as may be provided by law, except the religious sector...

## ARTICLE IX

### C. THE COMMISSION ON ELECTIONS

Sec. 6. A free and open party system shall be allowed to evolve according to the free choice of the people, subject to provisions of this Article.

Sec. 7. No votes cast in favor of a political party, organization, or coalition shall be valid, except for those registered under the party-list system as provided in this Constitution.

Sec. 8. Political parties, or organizations or coalitions registered under the party-list system, shall not be represented in the voters' registration boards, boards of election inspectors, boards of canvassers, or other similar bodies. However, they shall be entitled to appoint poll watchers in accordance with law.<sup>52</sup>

The party-list system gives a voter the opportunity to cast two votes for the House of Representatives --- one for the congressman representing the voter's legislative district, and another for a party-list representative.<sup>53</sup> In *Veterans Federation Party et al. v. Commission on Elections, et al.*,<sup>54</sup> the Supreme Court held that the twenty per centum party-list representation indicated in Article VI,

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<sup>52</sup> CONST., art. II, sec. 26; art. VI, secs. 5(1) and 5(2); art. IX-C, secs. 6, 7, and 8.

<sup>53</sup> Republic Act No. 7941 (otherwise known as the Party List System Act); *Ang Bagong Bayani-OFW Labor Party v. Commission on Elections et al.*, G.R. Nos. 147589 and 147613, June 26, 2001 (en banc); See Tangkia, Fritzie Palma and Ma. Araceli Basco Habaradas, "Party-List System: the Philippine Experience", at [http://www.fes.org.ph/papers\\_partylist.htm](http://www.fes.org.ph/papers_partylist.htm) (last visited 1 May 2008).

<sup>54</sup> *Veterans Federation Party et al. v. Commission on Elections et al.*, G.R. Nos. 136781, 136786, and 136795, October 6, 2000 (en banc). The Court chose not to adopt the German Bundestag's Niemeyer formula for allocating excess seats among parties meeting (and exceeding) the two percent threshold. Additional seats for each qualifying party are determined according to the following formula: Additional seat(s) = [No. of votes of concerned party / No. of votes of first party ] x No. of additional seats allocated to the first party

Section 5(2) of the 1987 Constitution comprises a mere 'ceiling' in the allocation of total number of House seats. What is mandatory is that the party should have at least two percent of the total valid votes cast under the party-list system to garner a seat in the House, on the theory that, "to have meaningful representation, the elected persons must have the mandate of a sufficient number of people. Otherwise...the result might be the proliferation of small groups which are incapable of contributing significant legislation, and which might even pose a threat to the stability of Congress."<sup>55</sup> Each qualified party that meets the two percent threshold is entitled to additional seats, but cannot exceed three seats in total.

The multiparty system has been critiqued for creating more partisan fragmentation in Philippine presidential elections, resulting in governments with 'weak' mandates from the voter population. As Jungug Choi observes, "[t]he Philippines is the only presidential democracy in the world using a plurality-rule electoral system to select its chief executive that has experienced a dramatic change in that system. The change altered the effective number of presidential candidates that participated in the vote."<sup>56</sup> The correlation between the multiparty system and democratic (in)stability in the Philippines, however, does not seem at all straightforward,<sup>57</sup> especially when other variables (e.g. differentiation of political elites, access to political capital and opportunities, nature of membership and leadership of political parties, absence of substantial ideological differences among parties) are taken into account.<sup>58</sup> Nonetheless, for purposes of scrutinizing constitutional design, it appears that the free and open party system, complemented with a partylist system for groups traditionally disenfranchised by lack of political or economic resources, was also envisaged by the 1986 Constitutional Commission as popular sovereignty mechanisms to redistribute governmental power, and thus guard against excessive concentration of political power, most especially in the executive branch.

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<sup>55</sup> Id.

<sup>56</sup> Choi, Jungug, "Philippine Democracies Old and New: Elections, Term Limits, and Party Systems", *Asian Survey*, Vol. 41, No. 3, (May- June 2001), pp. 488-501.

<sup>57</sup> The minority presidency of Fidel V. Ramos might appear more 'stable' than the overwhelming landslide majority victory of Joseph Estrada, whose presidency was cut short with his ouster in 2001. For a discussion of political competition and democratic transitions, See Wright, Frank, "Political Competition and Democratic Stability in New Democracies", *B.J. Pol. S.*38, 221-245, Cambridge University Press 2008.

<sup>58</sup> See Rocamora, Joel, "Philippine Political Parties, Electoral System, and Political Reform", *Philippines International Review*, Volume 1, No. 1, 1998; Schock, Kurt, "People Power and Political Opportunities: Social Movement Mobilization and Outcomes in the Philippines and Burma", *Social Problems*, Vol. 46, No. 3, (Aug. 1999), pp. 355-375, University of California Press.

### **1.2.6. Direct exercise of popular sovereignty by the people: Plebiscite, Initiative, Recall, and Referendum**

Apart from expanding the space for the Filipino people's participation in their choice of delegates to whom sovereign powers of government would be entrusted, the 1987 Constitution also provided other avenues for the Filipino people to directly exercise their popular sovereignty. Considering the ease by which the Marcos dictatorship was able to entrench itself in power through power redistributions that were almost unilaterally effected by an inordinately strong executive branch, the 1986 Constitutional Commission was assiduous in ensuring an *expanded* democratic space that restored the primacy of the people's sovereign authority. The following provisions of the Constitution provide for the authority of the Filipino people to: 1) ratify proposed amendments to the Constitution (**Plebiscite**); 2) directly propose amendments to the Constitution (**Initiative**); 3) directly remove a local government official for loss of confidence (**Recall**); 4) directly approve, amend, or reject any local ordinance passed by local legislatures or *sanggunians* (**Referendum**):

#### **"ARTICLE XVII**

#### **AMENDMENTS OR REVISIONS**

Sec. 1. Any amendment to, or revision of, this Constitution may be proposed by:

- (1) The Congress, upon a vote of three-fourths of all its Members; or
- (2) A constitutional convention.

Sec.2. Amendments to this Constitution may likewise be *directly proposed by the people through initiative* upon a petition of at least twelve per centum of the total number of registered voters, of which every legislative district must be represented by at least three per centum of the registered votes therein. No amendment under this section shall be authorized within five years following the ratification of this Constitution nor oftener than one every five years thereafter.

The Congress shall provide for the implementation of the exercise of this right.

Sec.3. The Congress may, by a vote of two-thirds of all its Members, call a constitutional convention, or by a majority vote of all its Members, submit to the electorate the question of calling such a convention.

Sec.4. Any amendment to, or revision of, this Constitution under Section 1 hereof shall be valid *when ratified by a majority of the votes cast in a plebiscite* which shall be held not earlier than sixty days nor later than ninety days after the approval of such amendment or revision.



Any amendment under Section 2 hereof shall be valid *when ratified by a majority of the votes cast in a plebiscite* which shall be held not earlier than sixty days nor later than ninety days after the Certification by the Commission on Elections of the sufficiency of the petition.

## ARTICLE X

### LOCAL GOVERNMENT

Sec. 3. The Congress shall enact a local government code which shall provide for a more responsive and accountable local government structure instituted through a system of decentralization *with effective mechanisms of recall, initiative, and referendum*, allocate among the different local government units their powers, responsibilities, and resources, and provide for the qualifications, election, appointment, and removal, term, salaries, powers and functions and duties of local officials, and all other matters relating to the organization and operation of local units.”

Chief Justice Reynato Puno stresses that the foregoing provisions ‘institutionalized the people’s might made palpable in the 1986 People Power Revolution’.<sup>59</sup> He notes the following excerpts from the Records of the 1986 Constitutional Commission to show the deliberate intent to establish the Philippines as a *democratic*, and not just republican, state:

“MR. SUAREZ. ... May I call attention to Section 1. I wonder who among the members of the committee would like to clarify this question regarding the use of the word “democratic” in addition to the word “republican”. Can the honorable members of the committee give us the reason or reasons for introducing this additional expression. Would the committee not be satisfied with the use of the word “republican”? What prompted it to include the word “democratic”? ....

MR. NOLLEDO. Madam President, I think as a lawyer, the Commissioner knows that one of the manifestations of republicanism is the existence of the Bill of Rights and periodic elections, which already indicates that we are a democratic state. Therefore the addition of “democratic” is what we call a “pardonable redundancy” the purpose being to emphasize that our country is republican and democratic at the same time...In the 1935 and 1973 Constitutions, “democratic” does not appear. I hope the Commissioner has no objection to that word.

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<sup>59</sup> Arturo M. Tolentino et al. v. Commission on Elections et al., G.R. No. 148334, January 21, 2004 (Puno, J., dissenting opinion).

MR. SUAREZ. No, I would not die for that. If it is redundant in character but it is for emphasis of the people's rights, I would have no objection. I am only trying to clarify the matter. (*citing 4 Records of the Constitutional Commission, p. 680*) ...

MR. NOLLEDO. I am putting the word "democratic" because of the provisions that we are now adopting which are covering consultations with the people. For example, we have provisions on recall, initiative, the right of the people even to participate in lawmaking and other instances that recognize the validity of interference by the people through people's organizations... (*citing 4 Records of the Constitutional Commission, p. 735*)

....

MR. OPLE. The Committee added the word "democratic" to "republican", and therefore, the first sentence states: 'The Philippines is a republican and democratic state.' May I know from the committee the reason for adding the word 'democratic' to 'republican'? The constitutional framers of the 1935 and 1973 Constitutions were content with 'republican'. Was this done merely for sake of emphasis?

MR. NOLLEDO. Madam President, that question has been asked several times, but being the proponent of this amendment, I would like the Commissioner to know that "democratic" was added because of the *need to emphasize people power and the many provisions in the Constitution that we have approved related to recall, people's organizations, initiative, and the like, which recognize the participation of the people in policy-making in certain circumstances.*

MR. OPLE. I thank the Commissioner. That is a very clear answer and I think it does meet a need...

MR. NOLLEDO. According to Commissioner Rosario Braid, "democracy" here is understood as participatory democracy. (*citing 4 Records of the Constitutional Commission, p. 752*).

MR. SARMIENTO. When we speak of republican democratic state, are we referring to representative democracy?

MR. AZCUNA. That is right.

MR. SARMIENTO. So why do we not retain the old formulation under the 1973 and 1935 Constitutions which used the words "republican state" because "republican state" would refer to a democratic state where people choose their representatives?

MR. AZCUNA. We wanted to emphasize the participation of the people in government.

MR. SARMIENTO. But even in the concept “republican state”, we are stressing the participation of the people...So the word “republican” will suffice to cover popular representation.

MR. AZCUNA. Yes, the Commissioner is right. *However, the committee felt that in view of the introduction of the aspects of direct democracy such as initiative, referendum, or recall, it was necessary to emphasize the democratic portion of republicanism, of representative democracy as well. So, we want to add the word “democratic” to emphasize that in this new Constitution there are instances where the people would act directly, and not through their representatives. (citing 4 Records of the Constitutional Commission, p. 769).*<sup>60</sup>

The introduction of new ‘direct democracy’ mechanisms in the 1987 Constitution such as initiative, recall, and referendum does not, however, preclude the exercise of judicial review on the propriety of the exercise of such mechanisms. The Supreme Court’s expanded power of judicial review has been appealed to, in many instances, to question the consistency of the ostensibly ‘direct democratic’ action with Constitutional proscriptions.<sup>61</sup> In *Raul L. Lambino et al. v. Commission on Elections*,<sup>62</sup> which involved a recent attempt at Constitutional ‘revision’ through people’s initiative, the Supreme Court held that the petition (proposing a change from the current bicameral presidential system to a unicameral parliamentary system) was constitutionally infirm for failing to comply with the required presentation of proposed constitutional amendments to all signatories of the proposed initiative, and most importantly, for wrongly using a people’s initiative to actually propose substantial *revisions* and not mere amendments to the Constitution. Speaking for the Court, Justice Antonio Carpio strenuously emphasized that this mode of direct democracy was not to be trifled with for spurious political purposes:

“The Constitution, as the fundamental law of the land, deserves the utmost respect and obedience of all the citizens of this nation. No one can trivialize the Constitution by cavalierly amending or revising it in blatant violation of the clearly specified modes of amendment and revision laid down in the Constitution itself.

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<sup>60</sup> Id. Emphasis supplied.

<sup>61</sup> See *Jose C. Miranda et al. v. Hon. Alexander Aguirre, et al.*, G.R. No. 133064, September 16, 1999 (en banc); *Alan Peter S. Cayetano v. Commission on Elections et al.*, G.R. Nos. 166388 and 166652, January 23, 2006 (en banc); *Enrique T. Garcia et al. v. Commission on Elections et al.*, G.R. No. 111511, October 5, 1993; *Miriam Defensor Santiago et al. v. Commission on Elections et al.*, G.R. No. 127325, March 19, 1997 (en banc).

<sup>62</sup> *Raul L. Lambino et al. v. Commission on Elections*, G.R. Nos. 174153 and 174299, October 25, 2006 (en banc).

To allow such a change in the fundamental law is to set adrift the Constitution in uncharted waters, to be tossed and turned by every dominant political group of the day. If this Court allows today a cavalier change in the Constitution outside the constitutionally prescribed modes, tomorrow the new dominant political group that comes will demand its own set of changes in the same cavalier and unconstitutional fashion. A revolving-door constitution does not augur well for the rule of law in this country.

An overwhelming majority --- 16,622,111 voters comprising 76.3 percent of the total votes cast --- approved our Constitution in a national plebiscite held on 11 February 1987. That approval is the unmistakable voice of the people, the full expression of the people's sovereign will. That approval included the prescribed modes for amending or revising the Constitution.

No amount of signatures, not even the 6,327,952 million signatures gathered by the Lambino Group, can change our Constitution contrary to the specific modes that the people, in their sovereign capacity, prescribed when they ratified the Constitution. The alternative is an extra-constitutional change, which means subverting the people's sovereign will and discarding the Constitution. This is one act the Court cannot and should never do. As the ultimate guardian of the Constitution, this Court is sworn to perform its solemn duty to defend and protect the Constitution, which embodies the real sovereign will of the people."

The above six mechanisms are specific innovations of the 1987 Constitution that provide transformative avenues for the broad and general mass of Filipino individuals to restrain the excesses of executive power. While there are many other devices<sup>63</sup> already present in the 1935 and 1973 Constitutions (and likewise reproduced in the 1987 Constitution) which traditionally serve as checks on the executive, I purposely draw attention to the above mechanisms to emphasize the 1986 Constitutional Commission's simultaneous policies of: 1) **direct inclusion** of Filipino individuals in the processes of executive accountability; and 2) **direct**

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<sup>63</sup> The separation of powers doctrine, legislative power of ratification of treaties, legislative power of the 'purse' and of the 'sword', legislative check (through the Commission on Appointments) on the President's appointment power, to name a few, have long featured in Philippine constitutional development. See Arturo M. Tolentino v. Secretary of Finance et al., G.R. Nos. 115455, 115525, 115543, 115544, 115754, 115781, 115852, 115873, 115931, August 25, 1994 (en banc), (*"The exercise of the treaty-ratifying power is not the exercise of legislative power. It is the exercise of a check on the executive power."*); Jesulito A. Manalo v. Pedro G. Sistoza et al., G.R. No. 107369, August 11, 1999 (en banc), (*"The framers of the 1987 Constitution deemed it imperative to subject certain high positions in the government to the power of confirmation of the Commission on Appointments and to allow other positions within the exclusive appointing power of the President."*); Miriam Defensor Santiago et al. v. Teofisto T. Guingona Jr. et al., G.R. No. 134577, November 18, 1998 (en banc), see concurring opinion of Justice Jose C. Vitug.

**participation** in decision-making and judgment-forming in the political collective, bypassing the agency of the Executive Branch. *Direct inclusion* is seen from the means by which the 1987 Constitution enables Filipino individuals (and without need of affiliation in any political substratum or grouping) to: 1) directly file petitions with courts to assail and annul executive actions devised or exercised with “grave abuse of discretion”; 2) file a verified complaint for impeachment (with endorsement of a Member of the House) against high constitutional officers, all the way to the President; or 3) seek the assistance of the Office of the Ombudsman to compel public officials’ performance of their duties, investigate anomalous uses of public funds, and prosecute errant and abusive government officials, among others. On the other hand, the 1987 Constitution enables *direct participation* of Filipino individuals in: 1) the choice of their governors when representation is meaningfully widened through an open electoral system complemented with a party-list system; and 2) the direct exercise of collective judgment in the fundamental organization of the polity (e.g. ratification of constitutional amendments by plebiscite; direct proposal of constitutional amendments by initiative; approval or rejection of local ordinances through referendum) and the political legitimacy of those in public office (e.g. recall elections at the local government level).

Clearly, what is implicit from the 1986 Constitutional Commission’s twin policies of direct inclusion and direct participation is the highest status accorded by the framers to Filipinos’ *individual rationalities* in determining and legitimating decisions in their political community. Indubitably, it is universalist contractarian thought that predominates when the 1987 Constitution holds as its core principle that “[t]he prime duty of the Government is to serve and protect the people”, and lays the State’s policy to “value the dignity of every human person and guarantee full respect for human rights”.<sup>64</sup> Core principle and State policy converge to jointly create the template for direct inclusion and direct participation of Filipino individuals in shaping public order.

Given the universalist design of the 1987 Constitution, which dilutes (if not removes in some instances) the traditional powers exercised by the people’s representatives, we must also consider that this individual rationality-driven process of shaping public order has now become subject to *judicial capture*. Given the expanded powers of judicial review under the 1987 Constitution, the role of the judiciary in its constitutional reading of Filipino individuals’ direct inclusion and direct participation becomes equally vital with its constitutional reading of the validity of the exercise of executive power. Under the 1987 Constitution, the Supreme Court now acts as a sort of political gatekeeper in mediating the lines of entry and access to sovereign power, and who (the people vis-à-vis their representatives) can properly wield such power in specific controversies. As the final arbiter of an ever-widening realm of controversies (due to the emasculation of the political question doctrine), the Supreme Court appears to have been entrusted

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<sup>64</sup> CONST., art. II, secs. 4 and 11.

by framers of the 1987 Constitution with the duty to define and interpret our political spaces --- doing so while simultaneously avoiding a renewal of executive entrenchment and arbitrariness under the Marcos regime, as well as Alexis De Tocqueville's fear of the "tyranny of the majority" in democracies.<sup>65</sup>

This returns us squarely to the counter-majoritarian concerns prior to the promulgation of the 1987 Constitution. Since the 1986 Constitutional Commission vested the Supreme Court with expanded powers of judicial review, the Court, in effect, is in the most significant position to deal with the 'mob rule' and 'weak state' criticisms against the 1987 Constitution. It is a position that alternately makes the Court vulnerable to charges of 'excessive judicial restraint' or 'unwarranted judicial activism'. Chief Justice Reynato Puno explains at length the inherent tensions in this constitutional role of the Supreme Court but asserts, however, that neither philosophy is exclusive under the 1987 Constitution:

"Judicial restraint assumes a setting of a government that is democratic and republican in character. Within this democratic and republican framework, both the apostles of judicial restraint and the disciples of judicial activism agree that government cannot act beyond the outer limits demarcated by constitutional boundaries without becoming subject to judicial intervention. The issue that splits them is the location of those limits. They are divided in delineating the territory within which government can function free of judicial intervention...

Judicial restraint thus gives due deference to the judiciary's co-equal political branches of government comprised of democratically elected officials and lawmakers, and encourages separation of powers. It is consistent and congruent with the concept of balance of power among the three independent branches of government. It does not only recognize the equality of the other two branches with the judiciary, but fosters that equality by minimizing inter-branch interference by the judiciary...

Adherents of judicial restraint warn that under certain circumstances, the active use of judicial review has a detrimental effect on the capacity of the democratic system to function effectively. Restraintists hold that large-scale reliance upon the courts for resolution of public problems could lead in the long run to atrophy of popular government and collapse of the broad-based political coalitions and popular accountability that are the lifeblood of the democratic system. They allege that aggressive judicial review saps the vitality from constitutional debate in the legislature. It leads to democratic

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<sup>65</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, (1900 ed., Colonial Press, New York); ALEXIS DE TOCQUEVILLE, *THE OLD REGIME AND THE FRENCH REVOLUTION*, (translation by Stuart Gilbert), (1983 ed., Doubleday).

debilitation where the legislature and the people lose the ability to engage in informed discourse about constitutional norms.

Judicial restraint, however, is not without its criticisms. Its unbelievers insist that the concept of democracy must include recognition of those rights that make it possible for minorities to become majorities. They charge that restraintists forget that minority rights are just as important a component of the democratic equation as majority rule is. They submit that if the Court uses its power of judicial review to guarantee rights fundamental to the democratic process --- freedoms of speech, press, assembly, association and the right to suffrage --- so that citizens can form political coalitions and influence the making of public policy, then the Court would be just as 'democratic' as Congress...

*I most respectfully submit, however, that the 1987 Constitution adopted neither judicial restraint nor judicial activism as a political philosophy to the exclusion of each other.* The expanded definition of judicial power gives the Court enough elbow room to be more activist in dealing with political questions but did not necessarily junk restraint in resolving them. Political questions are not undifferentiated questions. They are of a different variety.

The antagonism between judicial restraint and judicial activism is avoided by the *coordinacy theory of constitutional interpretation*. This coordinacy theory gives room for judicial restraint without allowing the judiciary to abdicate its constitutionally mandated duty to interpret the constitution. Coordinacy theory rests on the premise that within the constitutional system, each branch of government has an independent obligation to interpret the Constitution. This obligation is rooted on the system of separation of powers. The oath to 'support this Constitution' --- which the constitution mandates judges, legislators, and executives to take --- proves this independent obligation. Thus, the coordinacy theory accommodates judicial restraint because it recognizes that the President and Congress also have an obligation to interpret the constitution. In fine, the Court, under the coordinacy theory, considers the preceding constitutional judgments made by other branches of government. By no means, however, does it signify complete judicial deference. Coordinacy means courts listen to the voice of the President and Congress but their voice does not silence the judiciary. The doctrine in *Marbury v. Madison* that courts are not bound by the constitutional interpretation of other branches of government still rings true. As well stated, 'the coordinacy thesis is quite compatible with a judicial deference that accommodates the views of other branches, while not amounting to an abdication of judicial review.'

With due respect, I cannot take the extreme position of judicial restraint that always defers on the one hand, or judicial activism that never defers on the other. I prefer to take the contextual approach of the coordinacy theory which considers the constitution's allocation of decision-making authority, the constitution's judgments as to the relative risks of action and inaction by each branch of government, and the fears and aspirations embodied in the different provisions of the constitution. The contextual approach better attends to the specific character of particular constitutional provisions and calibrates deference or restraint accordingly on a case to case basis. In doing so, it allows the legislature adequate leeway to carry out their constitutional duties while at the same time ensuring that any abuse does not undermine important constitutional principles."<sup>66</sup>

Justice Jose C. Vitug characterizes the Supreme Court under the 1987 Constitution as "the balance wheel in State governance, function[ing] both as the tribunal of last resort and as the Constitutional Court of the nation."<sup>67</sup> This development marks what Samuel Issacharoff describes as a public expectation that constitutional courts in emerging democracies "play a more direct role in superintending the institutions of democracy, and particularly, in defining the limits of democratic decision-making".<sup>68</sup> Since courts assume a critical oversight role in political processes of participation, representation, and public accountability, Samuel Issacharoff offers four principles for courts to prevent succumbing to a 'one-size-fits-all' approach in resolving (what were previously and exclusively) political controversies:

- 1) *There should be actual claims of rights violations.* Issacharoff cautions against courts loosely packaging political claims *solely* through individual rights entitlements or vacuous claims of individual disenfranchisement. Courts must be vigilant in ascertaining the existence of an *actual* violation before authorizing judicial intervention.
- 2) *Where the controversy arises from the 'obligation to ensure accountability of the process to the electorate', judicial intervention in the political exercise is warranted.* Issacharoff places a high premium on the court's role in protecting democratic opportunities for genuine contestation (especially in elections), to prevent manipulation of electoral processes and institutions by self-interested incumbents and political insiders.
- 3) *Courts may intercede as a 'backstop against institutional desuetude'.* Issacharoff holds that judicial intervention is critical especially where the

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<sup>66</sup> Id. See concurring and dissenting opinion of Justice Reynato Puno.

<sup>67</sup> Id.

<sup>68</sup> Issacharoff, Samuel, "Democracy and Collective Decision Making", 6 Int'l. J. Const. L. 231, (April 2008), at 260.



electoral system becomes unresponsive due to a lock-up of power (as in the case of political dynasties) or when political institutional arrangements 'calcify' because there is 'insufficient political will for change' (or perhaps, a lack of access to political capital that would galvanize such change).

- 4) *Judicial oversight may serve as a 'protection against opportunism', particularly when political boundaries 'serve to isolate those who bear the costs from any realistic ability to challenge political decision-making occurring elsewhere'.* Issacharoff envisions an increasing role for constitutional courts in implementing international agreements, and extending protections to intended recipients (e.g. individuals, the environment, market players etc.) under these agreements.

The Supreme Court's expanded role under the 1987 Constitution is consistent with the latter's universalist design. Despite the apparent 'counter-republican' difficulty of entrusting vigilance over our political decision-making processes and institutions to unrepresentative courts, this difficulty is as much a function of constitutional design as the already existing gap between the articulated 'voice' of the majority and the elected legislature. Given power structures, interest brokering, and negotiation processes in legislatures, there can hardly be a straight one-to-one correspondence between the 'will of the majority' (e.g. the Filipino people) and their elected representatives (e.g. Congress). Julian Eule shows that the counter-majoritarian objection to judicial review is less persuasive since the 'quest for more accurate aggregation of majority will is misguided...the gap between the will of the majority and the voice of the legislature, it turns out, is there by constitutional design'.<sup>69</sup> Eule narrates that the Federalist framers of the United States Constitution also anticipated that the representation system in republican government could fail if: 1) representatives were too 'isolated' or insulated from checks by their constituents (e.g. regular elections prove inadequate), resulting in oppression or abuse; or 2) representatives were too 'responsive' to popular will, resulting in majority tyranny. Considering both these dangers, the Federalists' constitutional design purposely installed several 'representation filters' (e.g. separation of powers and federalism) to "check both the people's agents and the people themselves". In comprehending expanded judicial review under the 1987 Constitution, it may thus prove useful to examine Eule's conclusion that judicial review must be integrated in designing these filters:

"The 'difficulty' with judicial review entails its reconciliation with the constitutional version of democracy, not with some abstract form that exalts unfiltered majoritarianism. It would be more accurately conceptualized as a 'counter-representative' or 'counter-majoritarian' difficulty. The Framers rejected simple majority rule because of their fear of factions. In its place they installed a representative structure

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<sup>69</sup> Eule, Julian N., "Judicial Review of Direct Democracy", 99 Yale L. J. 1503 (May 1990), at 1514.

which simultaneously enjoyed a relative detachment from and an ultimate accountability to the populace. And to ensure that neither detachment nor accountability got the upper hand, they separated and divided the repositories of power. The role of the judge can only be assessed within the confines of this framework...

...Refined, or filtered majoritarianism, captures the virtues of popular sovereignty without being tainted by its vices. Judicial review must be integrated into this design.”<sup>70</sup>

### 1.3. Universalist Orientation

The 1987 Constitution epitomizes a rich universalist rights-culture in the Philippine constitutional system, informed by its own legal history and ideological developments, shared legal traditions from postcolonial perspectives, and by Philippine participation in the international legal order. It is no coincidence that Article III, or the Bill of Rights in the 1987 Constitution, is longer than its counterparts in the 1935 and 1973 Constitutions. It is not, however, the sole repository of individual rights under the constitutional system. Together with numerous other sections of the 1987 Constitution, the formulation of Article III reflects the universalist conceptions and predispositions of the 1986 Constitutional Commission.

At the time of the drafting of the 1987 Constitution, the Philippines had already been an active participant in the development of international human rights and humanitarian law. The Philippines was one of the original forty-eight (48) signatories to the United Nations Declaration,<sup>71</sup> officially joining the United Nations as a founding member on October 24, 1945. Prior to the adoption of the 1987 Constitution,<sup>72</sup> the Philippines had already ratified the following international instruments:<sup>73</sup>

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<sup>70</sup> Id. at 1532.

<sup>71</sup> The Philippines was one of the twenty-two subsequent adherents to the January 1, 1942, United Nations Declaration, which had twenty-six original signatories.

<sup>72</sup> The 1987 Constitution was drafted and adopted by the 1986 Constitutional Commission on October 15, 1986, and took effect upon ratification by the Filipino people in a plebiscite on February 2, 1987.

<sup>73</sup> See *ratification history* at <http://www.bayefsky.com> and <http://www2.ohchr.org> (last visited 8 May 2008). Subsequent to the promulgation of the 1987 Constitution, the Philippines also ratified the remaining two (2) major human rights treaties, the Convention on the Rights of the Child (CRC) which was ratified on August 21, 1990 and entered into force on September 20, 1990; and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) which was ratified on July 5, 1995 and entered into force on July 1, 2003. The Philippines signed the Convention on the Rights of Persons with Disabilities on September 25, 2007.

- 1) International Convention on Civil and Political Rights (ICCPR);<sup>74</sup>
- 2) International Convention on Economic, Social and Cultural Rights (ICESCR);<sup>75</sup>
- 3) Convention on the Elimination of Racial Discrimination (CERD);<sup>76</sup>
- 4) Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);<sup>77</sup>
- 5) Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);<sup>78</sup>
- 6) International Convention on the Suppression and Punishment of the Crime of Apartheid;<sup>79</sup>
- 7) Convention on the Prevention and Punishment of the Crime of Genocide;<sup>80</sup>
- 7) 1949 Geneva Conventions, along with other landmark instruments on international humanitarian law.<sup>81</sup>

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<sup>74</sup> Ratified on October 23, 1986. First Optional Protocol ratified on August 22, 1989, entered into force on November 22, 1989. Second Optional Protocol ratified on November 20, 2007, entered into force on February 20, 2008.

<sup>75</sup> Ratified on June 7, 1974, entered into force January 3, 1976.

<sup>76</sup> Ratified on September 15, 1967, entered into force January 4, 1969.

<sup>77</sup> Ratified on August 5, 1981, entered into force September 4, 1981. Amendment on Article 20(1) accepted on November 12, 2003. Optional Protocol in relation to Articles 8, 9, 10 ratified on November 12, 2003, entered into force on February 12, 2004.

<sup>78</sup> Ratified on June 18, 1986, entered into force on June 26, 1987. Amendment on Articles 17(7) and 18(5) accepted on November 27, 1996.

<sup>79</sup> Signed on May 2, 1974, and ratified on January 26, 1978.

See <http://www2.ohchr.org/english/bodies/ratification/7.htm> (last visited 8 May 2008).

<sup>80</sup> Signed on December 11, 1948, and ratified on July 7, 1950. See <http://www.unhchr.ch/html/menu3/b.treaty1gen.htm> (last visited 8 May 2008).

<sup>81</sup> See <http://www.icrc.org> (last visited 8 May 2008).

**The Philippines has already ratified the:** 1) June 17, 1925 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare; 2) July 27, 1929 Convention for the Amelioration of the Condition of the Wounded and Sick Armies in the Field; 3) July 27, 1929 Convention relative to the Treatment of Prisoners of War; 4) December 9, 1948 Convention on the Prevention and Punishment of Genocide; 5) November 26, 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity; 6) April 10, 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on their Destruction; 7) June 8, 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II); 8) October 10, 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects; 9) October 10, 1980 Protocol on Non-Detectable Fragments (Protocol I); 10) October 10, 1980 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II); 11) October 10, 1980 Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III). **The Philippines had also already signed the:** 1) May 14, 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict; 2) May 14, 1954 Protocol for the Protection of Cultural Property in the Event of Armed Conflict; and 3) June 8, 1977 Protocol Additional to the

Also prior to the adoption of the 1987 Constitution, the Philippines had already acceded to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol;<sup>82</sup> and the 1926 Slavery Convention.<sup>83</sup> Through its membership in the General Assembly of the United Nations, the Philippines has also expressed its belief in the universality of human rights long before the adoption of the 1987 Constitution.<sup>84</sup>

Moreover, long before the adoption of the 1987 Constitution, Philippine jurisprudence had also already progressively recognized the incorporation of various international human rights and humanitarian law instruments in the Philippine legal system. Over thirty years before the promulgation of the 1987 Constitution, the Philippine Supreme Court applied the Universal Declaration of Human Rights as “generally accepted principles of international law [forming] part of the law of the Nation” to rule against the indefinite detention of foreign nationals or stateless aliens.<sup>85</sup> In the landmark case of *Kuroda v. Jalandoni*,<sup>86</sup> the Supreme Court upheld the jurisdiction of a Military Commission (convened pursuant to the authority of the President’s powers as Commander in Chief of the armed forces) to try the Commanding General of the Japanese Imperial Forces in the Philippines for war crimes, holding that the Hague Convention and the Geneva Convention

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Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I).

<sup>82</sup> The Philippines acceded to both the Refugee Convention and its Protocol on July 22, 1981. See <http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf> (last visited 20 May 2008).

<sup>83</sup> The Philippines acceded to the Slavery Convention (but not the Protocol) on July 12, 1955. See <http://www.untreaty.un.org/english/bible/englishinternetbible/parti/chapterxviii/treaty2.asp> (last visited 28 May 2008).

<sup>84</sup> *Strict observance of the prohibition of the threat or use of force in international relations, and of the right of peoples to self-determination*, G.A. Res. 2160 (XXI), 1482<sup>nd</sup> plenary meeting, 30 November 1966; *Respect for human rights in armed conflicts*, G.A. Res. 2674 (XXV), 1922<sup>nd</sup> plenary meeting, 9 December 1970, G.A. Res. 2852 (XXVI), 2027<sup>th</sup> plenary meeting, 20 December 1971, G.A. Res. 3032 (XXVII), 2114<sup>th</sup> plenary meeting, 18 December 1972; *Basic principles for the protection of civilian populations in armed conflicts*, G.A. Res. 2675 (XXV), 1922<sup>nd</sup> plenary meeting, 9 December 1970; *Question of the violation of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of apartheid, in all countries, with particular reference to colonial and other dependent countries and Territories*, G.A. Res. 2714 (XXV), 1930<sup>th</sup> plenary meeting, 15 December 1970.

<sup>85</sup> *Boris Mejoff v. The Director of Prisons*, G.R. No. L-4254, September 26, 1951 (en banc); *Victor Borovsky v. The Commissioner of Immigration and the Director of Prisons*, G.R. No. L04352, September 28, 1951. See *Pio Duran v. Salvador Abad Santos*, G.R. No. L-99, November 16, 1945 (en banc), where Justice Gregorio Perfecto stated a strong dissent against the Supreme Court’s refusal to grant the petition of a Filipino political prisoner praying for bail:

“The denial of the petition is violative of the fundamental rights guaranteed, not only by the Constitution of the Philippines, but also by the Charter of the United Nations, which is now in full force in this country.”

<sup>86</sup> *Lieutenant General Shigenori Kuroda v. Major General Rafael Jalandoni, et al.*, G.R. No. L-2662, March 26, 1949.

already formed part of the law of the Philippines *even before* the Philippines signed both Conventions --- thus implicitly affirming the status of the Hague and Geneva norms as ‘generally accepted principles of international law’ even in the absence of treaty ratification:

“Petitioner argues that respondent Military Commission has no jurisdiction to try petitioner for acts committed in violation of the Hague Convention and the Geneva Convention because the Philippines is not a signatory to the first and signed the second only in 1947. It cannot be denied that the rules and regulations of the Hague and Geneva Conventions form part of and are wholly based on the generally accepted principles of international law. In fact, these rules and principles were accepted by the two belligerent nations, the United States and Japan, who were signatories to the two Conventions. *Such rules and principles, therefore, form part of the law of our nation even if the Philippines was not a signatory to the conventions embodying them, for our Constitution has been deliberately general and extensive in its scope and is not confined to the recognition of rules and principles of international law as contained in treaties to which our government may have been or shall be a signatory.*”

Significantly, nearly two decades since the adoption of the 1987 Constitution, a unanimous Philippine Supreme Court stressed the *obligatory effect* imposed by a postwar Supreme Court on the Universal Declaration of Human Rights (UDHR) in the Philippines. Relying on the incorporation of the UDHR as generally accepted principles of international law forming part of the law of the land, the unanimous Court in the 2007 case of *Government of Hongkong Special Administrative Region v. Hon. Felixberto T. Olalia Jr.* affirmed the correctness of a lower court order granting bail to a potential extraditee (departing from previous jurisprudence that limited the exercise of the right to bail to criminal proceedings):<sup>87</sup>

“...Thus, on December 10, 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights in which the right to life, liberty, and all the other fundamental rights of every person were proclaimed. **While not a treaty, the principles contained in the said Declaration are now recognized as customarily binding upon the members of the international community.** Thus, in *Mejoff v. Director of Prisons*, this Court, in granting bail to a prospective deportee, held that under the Constitution, the principles set forth in that Declaration are part of the law of the land. In 1966, the UN General Assembly also adopted the International Covenant on Civil and Political Rights which the Philippines signed and

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<sup>87</sup> *Government of Hongkong Special Administrative Region v. Hon. Felixberto T. Olalia Jr. and Juan Antonio Muñoz*, G.R. No. 153675, April 19, 2007 (en banc). Emphasis supplied.

ratified. Fundamental among the rights enshrined therein are the rights of every person to life, liberty, and due process.

The Philippines, along with the other members of the family of nations, committed to uphold the fundamental human rights as well as value the worth and dignity of every person. This commitment is enshrined in Section II, Article II of our Constitution which provides: 'The State values the dignity of every human person and guarantees full respect for human rights.' The Philippines, therefore has the responsibility of protecting and promoting the right of every person to liberty and due process, ensuring that those detained or arrested can participate in the proceedings before a court, to enable it to decide without delay on the legality of the detention and order their release if justified. In other words, the Philippine authorities are under obligation to make available to every person under detention such remedies which safeguard their fundamental right to liberty. These remedies include the right to be admitted to bail. While this Court in *Purganan* limited the exercise of the right to bail to criminal proceedings, however, in light of the various international treaties giving recognition and protection to human rights, particularly the right to life and liberty, a reexamination of this Court's ruling in *Purganan* is in order."

The universalist orientation of the 1987 Constitution is also readily apparent from the stated intentions of the 1986 Constitutional Commission. In *Brigido R. Simon Jr. et al. v. Commission on Human Rights et al.*,<sup>88</sup> the Supreme Court noted records of the 26 August 1986 deliberations of the 1986 Constitutional Commission to clarify the infusion of international human rights standards in the formulation of the 1987 Constitution's Bill of Rights:

"MR. BENGZON. That is precisely my difficulty because civil and political rights are very broad. The Article on the Bill of Rights covers civil and political rights. Every single right of an individual involves his civil right or his political right. So, where do we draw the line?

MR. GARCIA. Actually, these civil and political rights have been made clear in the language of human rights advocates, as well as in the Universal Declaration of Human Rights which addresses a number of articles on the right to life, the right against torture, the right to fair and public hearing, and so on. These are very specific rights that are considered enshrined in many international documents and legal instruments as constituting civil and political rights, and these are precisely what we want to defend here....

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<sup>88</sup> *Brigido R. Simon Jr. et al. v. Commission on Human Rights et al.*, G.R. No. 100150, January 5, 1994 (en banc).

MR. RAMA. In connection with the discussion on the scope of human rights, I would like to state that in the past regime, every time we invoke the violation of human rights, the Marcos regime came out with the defense that, as a matter of fact, they had defended the rights of people to decent living, food, decent housing and a life consistent with human dignity.

So I think we should really limit the definition of human rights [under the Bill of Rights] to political rights. Is that the sense of the committee, so as not to confuse the issue?

MR. SARMIENTO. Yes, Madam President....

MR. GARCIA. There are two international covenants: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The second covenant contains all the different rights --- the rights of labor to organize, the right to education, housing, shelter, etc.

MR. GUINGONA. So we are just limiting at the moment the sense of the committee to those that the Gentleman has specified.

MR. GARCIA. Yes, to civil and political rights.

MR. GUINGONA. Thank you."

Clearly, the 1986 Constitutional Commission knowingly encapsulated universalist ideology and perspectives in redefining the topography of constitutional rights discourse in the 1987 Constitution. Given the Philippines' own active participation in the development of international human rights and humanitarian law, it is equally understandable that the framers' process of defining individual rights in our constitutional system would also be imbued with universalist conceptions. Finally, it can be reasonably assumed that the framers of the 1987 Constitution were not unaware of the existence of postwar Philippine jurisprudence that *already incorporated* key universalist human rights norms in our constitutional system. Indeed, such postwar incorporation of universalist norms would be reiterated by the Philippine Supreme Court in post-1987 Constitution jurisprudence. As I will show at the Conclusion, the 1986 Constitutional Commission had foresight to maintain --- through the Incorporation Clause under Article II, Section 2 of the 1987 Constitution --- a key avenue towards preserving universalism in our constitutional system. It is to the Incorporation Clause that we owe the comprehensive protection of the Filipino individual's human rights and in turn, the Philippine government's corresponding obligations as a rights-respecting sovereign independent state in the international legal order.

#### 1.4. Universalist Philosophy

The 1987 Constitution stands as a distinct breakaway from previous eras in Philippine constitutional history due to its proximate derivation from the direct exercise of popular sovereignty in the 1986 EDSA 'people power' revolution. The 1986 EDSA Revolution definitively represents the concept of 'direct democracy'. The Filipino people's collective action of people power was motivated by the desire for a complete overhaul of the public order, and ultimately authorized by the sovereign will of the governed.<sup>89</sup> After Ferdinand Marcos fled the country, Corazon Aquino was proclaimed and sworn in as President of a revolutionary government that defied Marcos' 1973 Constitution, under powers taken and exercised 'in the name of the Filipino people'.<sup>90</sup> It is for this reason that Chief Justice Reynato Puno characterizes popular sovereignty as the 'primary postulate of the 1987 Constitution', which is decidedly 'more people-oriented' than previous Philippine Constitutions.<sup>91</sup>

The 1986 Constitutional Commission has characterized the 1987 Constitution as "pro-life, pro-people, pro-poor, pro-Filipino, and anti-dictatorship".<sup>92</sup> Associate Dean Myrna Feliciano explains:

"...It is *pro-life* because it bans nuclear weapons, protects the unborn from the moment of conception, abolishes the death penalty except in extreme cases when Congress may reimpose it, and protects the family as a basic autonomous social institution. It is considered *pro-people* because it includes policies to promote people's welfare i.e. a just and humane social order, adequate social services, the right to protection of health and to a balanced and healthful ecology and priority to education; allows greater participation by the people in government through a free and open party system, sectoral representatives, people's organizations, and the institution of the processes of initiative and referendum in law-

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<sup>89</sup> See Ackerman, Peter, and Jack DuVall, "The Right to Rise Up: People Power and the Virtues of Civic Disruption", 30-SUM Fletcher F. World Aff. 33 (Summer 2006).

<sup>90</sup> Noted law professor and Philippine legal historian Dante Gatmaytan states, however, that the exercise of people power should be dissociated from the concept of democratic revolution because 'Filipinos never attempted a fundamental change in political organization or government. [The 1986 EDSA Revolution] was directed against Marcos alone.' Instead, he offers a view of people power as 'an expression of outrage against a particular official, triggered by government action', or that 'it is a withdrawal of allegiance from the official in favor of another'. See Gatmaytan, Dante B., "It's All The Rage: Popular Uprisings and Philippine Democracy". 15 Pac. Rim L. & Pol'y. J. 1, (February 2006).

<sup>91</sup> A description also concurred in by former Philippine Supreme Court Chief Justice Hilario Davide Jr. See Juan G. Frivaldo v. Commission on Elections et al., G.R. Nos. 120295 and 123755, June 28, 1996 (en banc), see (separate concurring opinion, Puno, J.), (dissenting opinion, Davide, J.)

<sup>92</sup> 1986 Philippine Constitutional Commission, PRIMER: THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES, (1986) at 26.



making and constitutional amendment. It is *pro-poor* because it includes socio-economic policies that alleviate the plight of the underprivileged, and promotes social justice. It is *pro-Filipino* because there are provisions for control by Filipinos of the economy, educational institutions, mass media and advertising and public utilities; reservation to Filipinos of certain areas of investment, if in the national interest, and in the practice of all professions; a Filipino national language and the preservation of a Filipino national culture. It is *anti-dictatorship* because it puts limitations on the powers of the President and strengthens the powers of the Congress and the Judiciary, thus preventing the consolidation of powers in any one person or branch of government.”<sup>93</sup>

These ethical values in the 1987 Constitution mirror the central tenets of universalist philosophy, most especially the fundamental importance of the preservation and enhancement of human dignity. The institutions created by the 1987 Constitution have been consciously designed towards the fullest measure of ‘people empowerment’<sup>94</sup> as the ultimate check on governmental power. This demonstrates the framers’ confidence on Filipino individual rationality and political maturity<sup>95</sup> to define the space for public order, and in the process, to defend the widest possible range of liberties in the spectrum of human dignity, as well as the material conditions that make liberty and self-determination possible. Considering Philippine constitutional and legal history, intellectual influences, and active participation in the international legal order, the 1986 Constitutional Commissioners likewise assured the universalist substantive *content* of Filipino conceptions of liberties and human dignity values in the terminology and jurisprudential practice of constitutional rights discourse.

As I have endeavored to show in Part I of this Article in Volume 10 of the *Historia Constitucional*, universalism is the underlying philosophy and *telos* behind the institutional design and rights formulation in the 1987 Constitution because of the unique convergence of Filipino postcolonial and postmodern legal history and intellectual traditions. Unlike other Asian societies, our conceptions of rights are informed more by individualist, rather than communal (e.g. Confucian) orientations. Philippine practice in the international legal order since our original membership in the United Nations has also revolved around a universalist conception of rights and fundamental human dignity values. Our vision of public order, while ‘pro-Filipino’ in some essential respects, is not in any way overly emphatic of an isolationist state sovereignty. Thus, Philippine constitutional discourse under the

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<sup>93</sup> Id., pp. 189-190.

<sup>94</sup> See *Miriam Defensor Santiago et al. v. Commission on Elections et al.*, G.R. No. 127325, March 19, 1997 (en banc), see (separate concurring and dissenting opinion, Puno, J).

<sup>95</sup> See *comments of 1986 Constitutional Commissioner Bishop Teodoro Bacani in Victorino Dennis M. Socrates v. Commission on Elections et al.*, G.R. Nos. 154512, 154683, & 155083-84, November 12, 2002, (concurring opinion, Puno, J.)

1987 Constitution celebrates the centrality of the Filipino individual under an assumed equality and mutual interdependence, and consequently builds public order that both *restrains and conditions the legitimate exercise of governmental power* under shared values and conceptions of freedom, justice, and the good with the international legal order.

To complete the picture of universalism as ‘constitutionalized’ in the 1987 Constitution, I will focus on the modes of entry of universalist norms outside of express textualization in constitutional language. As I show in the remaining half of this Part II, the 1987 Constitution progressively adopts a pacifist internationalist policy on the use of force and prohibition of nuclear weapons, and anticipated the possible entry of universalist international legal norms under the Incorporation Clause.

## II. MODES OF ENTRY FOR UNIVERSALISM: PACIFIST INTERNATIONALISM AND THE INCORPORATION CLAUSE

The previous half of this Part II has dealt, to some degree, with the extensive textualization of universalist norms in the 1987 Constitution. Textualization (or direct constitutional or legislative enactment), however, is but one of the modes of entry for universalist legal norms in the domestic legal system. Treaty-making is another such mode. The conceptual problems in the controversial jurisprudential interpretations of the Philippine Executive’s treaty-making powers, however, could very well be the subject of an entire field of research, as seen from the ongoing work of most authoritative Philippine Constitutional scholars.<sup>96</sup>

I am more concerned with a less explored mode of entry for universalist norms, encapsulated in Article II, Section 2 of the 1987 Constitution:

“Sec. 2. The Philippines *renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land* and adheres to the

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<sup>96</sup> See among others Magallona, Prof. Merlin M., “Reflections on Philippine Foreign Policy”, University of the Philippines Forum, at <http://www.up.edu.ph/upforum.php?issue=17&i=128> (last visited 28 May 2008); Pangalangan, Dr. Raul C., “A Democracy of Kept Secrets”, Philippine Daily Inquirer, 28 March 2008; Roque, H. Harry, L., *Memorandum submitted to the Supreme Court in* Plaridel M. Abaya, et al. v. Hon. Secretary Hermogenes E. Ebdane Jr., in his capacity as Secretary of the Department of Public Works and Highways, et al., G.R. No. 167919, February 14, 2007; University of the Philippines Law Center Legal, Economic and Technical Opinion on the: (1) Contract Between the North Luzon Railways Corporation and China National Machinery and Equipment Corporation; and (2) Buyer Credit Loan Agreement No. BLA 04055 Dated 26 February 2004 Between the Export-Import Bank of China and the Government of the Republic of the Philippines; *Petition*, Jovito R. Salonga, et al. v. Executive Secretary, et al., in BAYAN et al. v. Ronaldo Zamora et al., G.R. Nos. 138570, 138572, 138587, 138680, & 138698, October 10, 2000, (en banc); JOAQUIN BERNAS, THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES (2003 ed.); See Asian Yearbook of International Law, Volume 4, (1994), at pp. 279-280.

*policy of peace, equality, justice, freedom, cooperation, and amity with all nations.*<sup>97</sup>

The above provision contains two universalist mechanisms: 1) a pacifist internationalist policy on the use of force vis-à-vis a policy of comity and cooperation; and 2) the incorporation of 'generally accepted principles of international law as part of the law of the land'. Both of these mechanisms are clearly undergirded by a universalist intent, but to date remain undertheorized and underutilized in Philippine legal practice. The stream of Philippine jurisprudence since the adoption of the 1987 Constitution exhibits some inconsistency in the application of these universalist mechanisms. As will be subsequently shown, the framers' conceptions of Philippine foreign policy and the Incorporation Clause were likewise informed and shaped by universalist understandings; derived conceptions from other constitutional orders from which the Philippines formulated the norm in previous constitutional eras; and Philippine practices in the international legal order.

## **2.1. Pacifist International Policy on the Use of Force vis-à-vis Policy of Comity and Cooperation**

The 1986 Constitutional Commission declared the function of the Declaration of Principles and State Policies (Article II) of the 1987 Constitution as the "statement of the basic ideological principles that underlie the Constitution. As such, the provisions shed light on the meaning of the other provisions of the Constitution and they are a guide for all departments of the government in the implementation of the Constitution."<sup>98</sup> While generally ruling that provisions of the Constitution are "considered self-executing, and do not require future legislation for their enforcement", the Philippine Supreme Court has categorically declared various sections of Article II of the 1987 Constitution as non-self executing.<sup>99</sup> The

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<sup>97</sup> CONST., art. II, sec. 2. Emphasis and underscoring supplied.

<sup>98</sup> Sponsorship Speech of Commissioner Tingson, Vice-Chairman of Committee on Preamble, National Territory and Declaration of Principles, Record of the 1986 Constitutional Commission No. 81, September 12, 1986 (Consideration of Proposed Resolution No. 537, Article on Declaration of Principles). See

<sup>99</sup> See *Tondo Medical Center Employees Association et al. v. The Court of Appeals*, G.R. No. 167324, July 17, 2007, (en banc):

"In *Tanada v. Angara*, the Court specifically set apart the sections found under Article II of the 1987 Constitution as non self-executing and ruled that such broad principles need legislative enactments before they can be implemented:

By its very title, Article II of the Constitution is a 'declaration of principles and state policies'.... These principles in Article II are not intended to be self-executing principles ready for enforcement through the courts. They are used by the judiciary as aids or guides in the exercise of its power of judicial review, and by the legislature in its enactment of laws.

In *Basco v. Philippine Amusement and Gaming Corporation*, this Court declared that Sections 11, 12, and 13 of Article II; Section 13 of Article XIII; and Section 2 of Article XIV of the 1987 Constitution are not self-executing provisions. In *Tolentino v. Secretary of Finance*, the Court

Court, however, has applied Article II, Section 2 of the 1987 Constitution in recent cases without requiring prior legislative enactment.<sup>100</sup>

As seen from the records of the 1986 Constitutional Commission, the Philippine constitutional policy renouncing war is a restatement of similar principles in the 1935 Constitution,<sup>101</sup> and a verbatim reproduction from the 1973 Constitution.<sup>102</sup> The reiteration of the policy against renunciation of war in the 1987 Constitution is described as a “confirmation of our adherence to international harmony and order”. The pacifist internationalist policy is further supplemented by new provisions on neutrality and freedom from nuclear weapons:<sup>103</sup>

“Sec. 7. The State shall pursue an independent foreign policy. In its relations with other states the paramount consideration shall be national sovereignty, territorial integrity, national interest, and the right of self-determination.

Sec.8. The Philippines, consistent with national interest, adopts and pursues a policy of freedom from nuclear weapons in its territory.”

Pursuant to the above constitutional policy, the 1987 Constitution also prohibits foreign military bases, troops or facilities in the Philippines “except under

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referred to Section 1 of Article XIII and Section 2 of Article XIV of the Constitution as moral incentives to legislation, not as judicially enforceable rights. These provisions, which merely lay down a general principle, are distinguished from other constitutional provisions as non self-executing and, therefore, cannot give rise to a cause of action in the courts; they do not embody judicially enforceable constitutional rights.”

<sup>100</sup> See *Government of Hongkong Special Administrative Region v. Hon. Felixberto T. Olalia Jr. et al.*, G.R. No. 153675, April 19, 2007 (en banc); *Pharmaceutical and Health Care Association of the Philippines v. Health Secretary Francisco T. Duque III et al.*, G.R. No. 173034, October 9, 2007 (en banc); *Priscilla C. Mijares et al. v. Hon. Santiago Javier Ranada et al.*, G.R. No. 139325, April 12, 2005; *Arthur D. Lim et al. v. Honorable Executive Secretary et al.*, G.R. No. 151445, April 11, 2002 (en banc); *Secretary of Justice v. Hon. Ralph C. Lantion et al.*, G.R. No. 139465, January 18, 2000 (en banc); *BAYAN et al. v. Ronaldo Zamora et al.*, *id* at note 320; *Republic of Indonesia et al. v. James Vinzon*, G.R. No. 154705, June 26, 2003 (en banc); *Government of the United States of America v. Guillermo G. Purganan et al.*, G.R. No. 148571, September 24, 2002 (en banc); *M.H. Wylie et al. v. Aurora I. Rarang et al.*, G.R. No. 74135, May 28, 1992; *United States of America et al. v. Hon. Eliodoro B. Guinto, et al.*, G.R. Nos. 76607, 79470, 80018, 80258, February 26, 1990 (en banc); *United States of America et al. v. Hon. Luis R. Reyes, et al.*, G.R. No. 79253, March 1, 1993 (en banc); *Loida Q. Shauf et al. v. Hon. Court of Appeals et al.*, G.R. No. 90314, November 27, 1990.

<sup>101</sup> 1935 CONST., art. II, sec. 3: “The Philippines renounces war as an instrument of national policy, and adopts the generally accepted principles of international law as a part of the law of the Nation.”

<sup>102</sup> 1973 CONST., art. II, sec. 3: “The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land, and adheres to the policy of peace, equality, justice, freedom, cooperation and amity with all nations.”

<sup>103</sup> *Id.*

a treaty duly concurred in by the Senate and, when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for the purpose, and recognized as a treaty by the other contracting State”.<sup>104</sup> The Constitutional Commissioners included this prohibition out of consideration for “national survival, the security and safety of our people, national sovereignty, and the unique Filipino contribution to world peace and disarmament in this part of the world”.<sup>105</sup> The Philippine Supreme Court, however, has not interpreted the prohibition to include “temporarily visiting United States military and civilian personnel” under the Visiting Forces Agreement (VFA) between the Philippines and the United States of America.<sup>106</sup>

The constitutional policy on the renunciation of war, dating back to the 1935 Constitution, was inspired by the 1929 Kellogg-Briand Pact. The 1934 Constitutional Convention approved the renunciation policy in reference to *aggressive* war, and “never to war in self-defense”.<sup>107</sup> On the other hand, the 1986 Constitutional Commission included a constitutional policy declaring the Philippines a nuclear weapons-free zone in consideration of the “common heritage of mankind” and growing international practice against nuclear non-proliferation.<sup>108</sup> The intention was not only to restrain Philippine foreign policy towards the neutrality of a negative peace, but more to encourage Philippine foreign policy to abide by (apparently Kantian) internationalist principles. Constitutional Commissioner Felicitas Aquino discussed this pacifist internationalist policy at length in the context of the postwar transformation of obligations in the international legal order:

“How can neutrality be defined in the context of positive peace as put forward in the UN Charter?

Positive peace must be distinguished from negative peace, the latter meaning the absence of war, but a genuine peace must be positive. To say that peace is the absence of war is to say that there is no peace. Positive peace means to eradicate the causes of war by creating the economic, cultural, social and political conditions that would eliminate tension and the objective causes of wars or conflicts...

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<sup>104</sup> CONST., art. xviii, sec. 25.

<sup>105</sup> Id. see sponsorship speech of Commissioner Edmundo G. Garcia.

<sup>106</sup> Id.; see Arthur D. Lim et al. v. Hon. Executive Secretary et al., G.R. No. 151445, April 11, 2002 (en banc).

<sup>107</sup> Id. at pp. 142-144.

<sup>108</sup> Id., see sponsorship speech of Commissioner (presently Supreme Court Associate Justice) Adolfo S. Azcuna.

Neutrality, therefore, in emancipating these countries from the military blocs restores their sovereign rights, which eventually would lead to the following conclusions:

1. Neutrality is a form of peaceful coexistence in the present times when the forces of peace are gaining on the forces making war and, when it is possible and indeed historically necessary, for countries of different political systems to live in peace and cooperate with each other.
2. This new type of neutrality is, therefore, inseparable from peace and is a peace neutrality which contributes to world peace. This peace neutrality excludes participation in military blocs or military alliances, rejects all foreign military bases and opposes the stockpiling of nuclear weapons in the territory of the country concerned, the nuclearization of its army and the flight of aeroplanes armed with nuclear weapons.
3. In a period when countries adopting a policy of peace have made headway, neutrality may well take on new forms, including the conclusion of nonaggression pacts.
4. Particularly in the case of African and Asian countries who have gained their independence at the cost of immense sacrifice and suffering in a fierce struggle against colonialism, neutrality is an essential guarantee of their independence.

Contrary to the opinion in the years from 1940 to 1945, we have witnessed a revival of neutrality in recent years which has not coincided with an increase in international tension and is not due to any weakening in the organization of the society of nations. This revival is based on a new definition of neutrality, which in essence is nonbelligerence and which finds itself in harmony with the UN Charter, if their twin characteristics of flexibility and precision are to be taken into consideration.

*In Southeast Asia, the adoption of a pacifist and neutralist foreign policy is inexorable.* The recently concluded ASEAN conference held in Manila in June this year has made it clear that the basic security orientation of ASEAN and its individual members is one of neutrality and nonalignment with the superpowers....

*The great transformations now taking place in the structure of the international community in this period of peaceful coexistence open new vistas for the peoples of the world, especially for those who are*

still one way or the other subject to the exploitation of foreign monopolies.

A policy based on the balance of power is an obstacle to a world system of peace and international security. All this indicates the size and extent facing the international community at the decisive period of its history. We can thus realize the importance of the part to be played by the Asian nations in particular, in the sense that *they must unite their efforts for the maintenance of peace by adopting an independent foreign policy, free from subjection to any given sphere of interest*. Neutrality is closely linked to national sovereignty and independence and inconsistent with adherence to or membership in any military pact.

Neutrality, therefore, is a concrete product, not an abstract hypothesis of the community of nations. Leaving room as it does for the play of different ideological attitudes and various nonmilitary measures, neutrality can no longer be considered an expression of national egoism or indifference to a just cause.

On the contrary, neutrality is a position that seems to be entirely justified insofar as it represents the particular historical and geographical circumstances of the region. It presents a compromise between the ideals of a fully integrated organization and the political contingencies of today. In this sense, neutrality serves the cause of peace. It is, in fact, a force of peace.”<sup>109</sup>

Without denominating any specific ideological-philosophical school of thought, the framers of the 1986 Constitutional Commission had apparently contemplated and embraced core tenets of Immanuel Kant’s Definitive Articles for Perpetual Peace.<sup>110</sup> First, the Constitutional framers expressly provided for Philippine republicanism as the essence of its nature as a democratic state, based on (the palpably Kantian First Definitive Article, *‘the civil constitution of every state shall be republican’*) recognition that lasting domestic and international peace could only be realized if liberal political-ideological structures and constitutional-legal institutions were in place.<sup>111</sup> Second, the 1986 Constitutional Commission’s

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<sup>109</sup> Record of the 1986 Constitutional Commission No. 83, September 15, 1986 (Consideration of Proposed Resolution No. 537, Article on the Declaration of Principles), see sponsorship speech of Commissioner Corazon Aquino; see *discussions and further clarifications on neutrality and pursuit of an independent foreign policy in* Record of the 1986 Constitutional Commission No. 84, September 16, 1986, (Consideration of Proposed Resolution No. 537, Article on the Declaration of Principles, Continuation, Period of Sponsorship and Debate).

<sup>110</sup> IMMANUEL KANT, KANT’S PERPETUAL PEACE: A PHILOSOPHICAL PROPOSAL, (1927 ed., Sweet & Maxwell, London).

<sup>111</sup> Id., September 16, 1986, clarifications between (sponsor) Constitutional Commissioner Jose N. Nollado and (interpellant) Constitutional Commissioner Jaime S.L. Tadeo; Record of the 1986 Constitutional Commission No. 85, September 17, 1986 (Consideration of Proposed

pacifist internationalist vision of neutrality based on an independent foreign policy among fellow liberal nation-states in the world order exemplifies Kant's Second Definitive Article (*'liberal republics will progressively establish peace among themselves by means of the pacific federation or union in the foedus pacificum'*).<sup>112</sup> Finally, the 1987 Constitution's entirely new provision expressing the Philippine state's espousal and acceptance of cosmopolitan values based on dignity and human rights<sup>113</sup> bears strains of the universalist understanding of Kant's 'cosmopolitan right' in his Third Definitive Article (*'the establishment of a cosmopolitan law to operate in conjunction with the pacific union', where such cosmopolitan law would be 'limited to conditions of universal hospitality'*).<sup>114</sup>

The acceptance of a seemingly Kantian vision is not altogether unexpected. At the time of the drafting of the 1987 Constitution, Kantian thought was already greatly determinative of international legal developments facilitated under the United Nations system. Moreover, the concepts of republicanism, liberal values, and political cosmopolitanism had already gained considerable currency at the time of the Philippines' ongoing active participation in the international legal order.<sup>115</sup>

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Resolution No. 357, Article on Declaration of Principles, Continuation, Period of Sponsorship and Debate, Second Reading), clarifications between Constitutional Commissioners Bernardo M. Villegas, Jose Luis Martin C. Gascon, Edmundo G. Garcia, Florangel Rosario Braid.

<sup>112</sup> Id., September 16, 1986, clarifications between (sponsor) Constitutional Commissioner Felicitas S. Aquino and (interpellants) Constitutional Commissioners Ma. Teresa F. Nieva, Yusuf R. Abubakar, Edmundo G. Garcia, Teodulo C. Natividad, Jose Luis Martin C. Gascon, Rene V. Sarmiento, Hilario G. Davide Jr.; Id. at note 335, clarification by Constitutional Commissioner Adolfo S. Azcuna on the renunciation of war:

"MR. AZCUNA. We can defend ourselves. We renounce war only when it is an aggressive war.

MR. GASCON. As an aggressive policy of the State.

MR. AZCUNA. This is taken from the Pact of Paris of 1926, otherwise known as the Kellogg-Briand Pact, which was incorporated in our Constitution in 1935. It is the renunciation of war as an instrument of national policy. This was also elevated to the UN Charter --- renouncing the use of threat or force in international relations. And this has ripened into what is known as a peremptory norm in international law --- a *jus cogens* that is an imperative norm which not even a binding treaty can provide against; a treaty that violates a fundamental norm in international law would be void. So, we cannot even have a treaty allowing aggression. That would be a void treaty. So, this is very fundamental why we put it here."

<sup>113</sup> CONST., art. II, sec. 11: "The State values the dignity of every human person and guarantees full respect for human rights."

<sup>114</sup> See Proposed Resolution No. 186 of Constitutional Commissioner Jose N. Nollado ("Resolution to Include in the Declaration of Principles a Provision that the State Recognizes the Dignity of the Human Personality and Guarantees Full Respect for Human Rights"), which was largely accepted without debate in the final version of Article II, Section 11 of the 1987 Constitution.

<sup>115</sup> Id; See Buergethal, Thomas, "Codification and Implementation of International Human Rights", pp. 15-21, in HUMAN DIGNITY: THE INTERNATIONALIZATION OF HUMAN RIGHTS, (1979 ed., Aspen Institute for Humanistic Studies).



## 2.2. The Incorporation Clause and Jurisprudential Reference to Foreign Sources

The Incorporation Clause, (or the adoption of '*generally accepted principles of international law as part of the land*' under Article II, Section II of the 1987 Constitution) first surfaced in Philippine constitutional history in Article II, Section 3 of the 1935 Constitution ('*The Philippines...adopts the generally accepted principles of international law as part of the law of the Nation*').<sup>116</sup> 1934 Constitutional Convention Delegate Jose M. Aruego reports on the Convention's inspirations and intentions in adopting this clause:

"The second part of this declaration of principle --- the adoption of the generally accepted principles of international law as a part of the law of the Nation --- was *borrowed from section 4 of the German Constitution and section 7 of the Constitution of the Republic of Spain.*

The intention of the framers of the Constitution was to incorporate expressly into the system of municipal law the principles of international law, *the observance of which would be necessary to the preservation of the family of nations* which the Philippines was expected to join at the expiration of the Commonwealth period in the Tydings-McDuffie law.

This provision is a formal declaration of what is considered to be the primordial duty of every member of the family of nations, namely, *to adjust its system of municipal law so as to enforce at least within its jurisdiction the generally accepted principles of international law.*"<sup>117</sup>

The trend of Philippine constitutional jurisprudence from 1935 to 2007 largely shows that the Philippine Supreme Court almost always refers to this operative phrase in Article II, Section II of the 1987 Constitution (and its antecedent or counterpart provisions in the 1935 Constitution and the 1973 Constitution) in two senses. In the first sense, the Court uses this clause *directly*, as when it declares and applies the existence of an international legal norm in the Philippine legal system through mechanisms of "incorporation" or "transformation" (e.g. through domestic legislative enactment). In the second sense, the Court uses this clause *indirectly or obliquely*, to justify its comparative reference to foreign sources as an aid to constitutional interpretation. Both senses to Article II, Section II of the 1987 Constitution inevitably entail acts of *judicial recognition*. This in itself necessitates some detailed inquiry into the Court's methodology, most especially when the entry of universalist norms are implicated in the process.

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<sup>116</sup> Art. II, Section 2 of the 1987 Constitution is a verbatim reproduction of Art. II, Sec. 3 of the 1973 Constitution: "The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land, and adheres to the policy of peace, equality, justice, freedom, cooperation and amity with all nations."

<sup>117</sup> *Id.* at Volume I, pp. 144-145. Emphasis supplied.

A historical-contextual analysis of Philippine jurisprudential treatment of Article II, Section II of the 1987 Constitution (and its similar antecedent provisions in the 1973 Constitution and the 1935 Constitution, respectively), taken alongside some ‘originalist’ clarifications (particularly on the provenance of this norm from the German Constitution and the Spanish Constitution) does yield a certain set of possible ‘governing dynamics’ that could be of some assistance for judges burdened with the task of discovering ‘generally accepted principles of international law’ that form ‘part of the law of the land’. Whether in the *direct* or *indirect* senses of its usage, I submit that our application of Article II, Section II of the 1987 Constitution can be guided by its nature as a critical avenue for the entry and permeation of universalism in our legal system and constitutional discourse. There is greater internal consistency to the judicial process of *value-definition* when the Court applies or invokes Article II, Section II of the 1987 Constitution, precisely because of the postcolonial and postmodern legal history, universalist ideological motivations, and accompanying Philippine practice in the international legal order --- all of which jointly infused the framers’ ascribed meanings. Since our human dignity value conceptions in the 1987 Constitution were either coincidental with, or largely drawn from, universalist conceptions in the international legal order, there is actually a much narrower gap between ‘originalist’ and ‘evolutionary’ readings to the 1987 Constitution (especially in relation to universalist legal norms) than expected.

And yet, there is still some reluctance to use the Incorporation Clause to recognize the existence of international legal norms in the Philippine legal system, largely borne out of difficulty in ascertaining the presence of the norm outside of legislative enactment. This difficulty was recently illustrated in the debate over the doctrine of command responsibility, when the Philippine Supreme Court designated specialized tribunals in 2007 to try cases of extrajudicial killings and enforced disappearances. The doctrine became the subject of considerable debate, since there is, to date, no statute providing for criminal penalties for command responsibility.<sup>118</sup> The Supreme Court, under a prewar (1935) Constitutional regime, however, had previously affirmed in two landmark cases that the 1907 Hague Regulations and the 1949 Geneva Conventions formed ‘part of the law of the land’.<sup>119</sup> A landmark United States Supreme Court case, *In re Yamashita* (the original antecedents of which began in the Philippines with the prosecution of General Tomoyuki Yamashita for war crimes and crimes against humanity committed against Filipinos during Japanese occupation in the Second World War), reiterated the doctrine of command responsibility. On the basis of the incorporation of the doctrine of command responsibility in the Philippine legal

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<sup>118</sup> See Lopez, Allison, “Judge cites commanders criminally liable for slays”, Philippine Daily Inquirer, June 27, 2007,

at [http://newsinfo.inquirer.net/breakingnews/nation/view\\_article.php?article\\_id=73419](http://newsinfo.inquirer.net/breakingnews/nation/view_article.php?article_id=73419) (last visited 28 May 2008).

<sup>119</sup> *Shigenori Kuroda v. Major General Rafael Jalandoni et al.*, G.R. No. L-2662, March 26, 1949 (en banc); *Yamashita v. Styer*, .R. No. L-129, December 19, 1945 (en banc).

system, trial court judges have been urged to take cognizance of cases filed against high-ranking military officers believed to have either directly perpetrated, or omitted to investigate, prosecute, or punish extrajudicial killings and/or enforced disappearances committed by subordinates.<sup>120</sup>

When the Incorporation Clause was first textualized in the 1935 Constitution, then Philippine Supreme Court Associate Justice Gregorio Perfecto was vocal (at times, to the point of being outright vitriolic) in expressing his concerns about the entry of international legal norms in the Philippine legal system. His dissatisfaction with the use of the Incorporation Clause is best captured in his dissenting opinion in the 1947 case of *Tubb et al. v. Griess*.<sup>121</sup> In this case, ten out of the eleven members of the Court voted to deny a habeas corpus petition filed by two citizens of the United States who had been detained by the United States Army under charges of misappropriation of United States government property destined for military use. Among various claims, the petitioners asserted that their detention was an unlawful infringement of Philippine courts' exclusive jurisdiction.

The Court majority affirmed the US Army's jurisdiction to detain the petitioners. The majority decision, penned by then Philippine Supreme Court Chief Justice Manuel Moran, anchored the petition's denial on a principle of international law that "a foreign army allowed to march through a friendly country or to be stationed in it, by permission of its government or sovereign, is exempt from civil and criminal jurisdiction of the place". Accordingly, the "grant of free passage implies waiver of all jurisdiction over the troops during their passage." The primary sources relied upon by the Court as evidence of the international legal principle were a United States Supreme Court decision, *The Schooner Exchange v. McFadden* (7 Cranch 116), and commentaries from international law publicists such as Wheaton, Hall, Lawrence, Oppenheim, Westlake, Hyde, McNair, Lauterpacht, and Vattel.

The lone dissenter, Justice Perfecto, then wrote a caustic opinion<sup>122</sup> on what he deemed, at the very least, an ill-advised reliance on international law by the Court:

"Since international law has been indiscriminately and confusingly misapplied in support of the glaringly erroneous majority

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<sup>120</sup> See MELO COMMISSION REPORT, 22 January 2007; Desierto, Diane A., "The Contours of Command Responsibility: Philippine Incorporation and Customary Evolution", 2 APYIHL (2006), Asia-Pacific Yearbook of International Humanitarian Law, Vol. No. 2:2006-2007.

<sup>121</sup> *George L. Tubb et al. v. Thomas E. Griess*, G.R. No. L-1325, April 7, 1947 (en banc).

<sup>122</sup> Justice Perfecto penned two other dissenting opinions castigating the Court's use and application of international law espousing similar doubt over the structural integrity and constitutional meaning of the Incorporation Clause. *Godofredo Dizon v. The Commanding General of the Philippine Ryukus Command, United States Army*, G.R. No. L-2110, July 22, 1948 (dissenting opinion, Perfecto, J.); *Co Cham v. Eusebio Valdez et al.*, G.R. No. L-5, September 17, 1945 (en banc), see (dissenting opinion, Perfecto, J.)

opinion in *Co Kim Chan v. Valdez Tan Keh and Dizon*, many have been misled into imitating the example to the extent of creating a portentous judicial vogue. The fashion is morbidly contagious. It seems that one is liable to lose his self-respect if he cannot invoke international law once in a while, although to do it he has to hurriedly scratch the surface of the science and often misread his authors, an unavoidable risk in litigations where there is no legal issue between nations...

Misunderstood, misinterpreted, misapplied, international law has become a sort of juridical panacea, a universal thesaurus, always at hand for any solution that can be desired in any ticklish litigation. It is even recognized as endowed with aseity.

The root of this awry judicial attitude lies in a glaring misunderstanding and misconception of section 3, Article VIII of the Constitution which says: "*The Philippines renounces war as an instrument of national policy, and adopts the generally accepted principles of international law as part of the law of the Nation.*"

There is the mistaken idea that international law had become part of the Constitution and even superior to the primary principles and fundamental guarantees expressly enunciated therein. To correct such a mistake, it is necessary to remember the following basic ideas:

1. That the declaration that the Philippines 'adopts the generally accepted principles of international law as part of the law of the Nation' is an enunciation of a general national policy but never intended to lay down specific principles, provisions, or rules superior or even equal to the specific mandates and guarantees in the fundamental law.

2. That 'the generally accepted principles of international law' made part of our statute books are not placed in a higher legal hierarchy than any other that Congress may enact.

3. That said 'generally accepted principles of international law' are not fixed and unchangeable but, on the contrary, may undergo development and amplification, amendment, and repeal, that is, the same biological rules that govern all laws, including the fundamental one.

4. That the general statement made by the Constitution implies that the principles of international law which should be considered as part of the law of the land are subject to determination by the agencies of government including courts of justice, and once

determined they may be amended, enlarged, or repealed, exactly as any act of Congress.

5. That those principles are to be gathered from many sources -- treaties and conventions, court decisions, laws enacted by legislatures, treatises, magazine articles, historical facts and others -- and the majority of them must be sifted from conflicting opinions coming from said sources.

6. That the provisions of the Constitution should always be held supreme and must always prevail over any contrary law without exempting principles of international law, no matter how generally or universally they may be respected.”<sup>123</sup>

The above theory from Justice Perfecto, himself a former member of the 1934 Constitutional Convention that drafted the 1934 Constitution, *did not reference or cite any portion of the Constitutional Convention records* in support of the meaning ascribed to the Incorporation Clause. Neither did Justice Perfecto cite any authority to support his reading of the Incorporation Clause.

This does not mean, however, that Justice Perfecto eschewed international law altogether as a source of normativity in the Philippine legal system. In his same dissenting opinion in *Tubb*, Justice Perfecto himself affirmed the primacy of international law *from the perspective of Philippine obligations under the Charter of the United Nations*:

“Proneness to read in the writings of authorities of international law or even in judicial decisions any ruling, principle, or doctrine that may justify the trampling down of the fundamental human rights invoked by petitioners, rights which are specifically guaranteed in our Constitution and in the constitutions of all democracies and enlightened countries, must have been corrected once and for all since June 25, 1945, when the Charter of the United Nations was adopted in San Francisco.

*Since then, the principles of international law which may happen to be incompatible or deviating from the principles and ideals enunciated in the Charter must be considered obsolete...*

Anybody will notice that ‘fundamental human rights’ and ‘dignity and worth of the human person’ form part of the supreme concern of the United Nations. Neither the Philippines nor the United States of America can honorably ignore the solemn commitments entered into by them as members of the United Nations. All the agencies of their

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<sup>123</sup> Id., see dissenting opinion, Perfecto, J.

respective governments, including tribunals and armies, are duty bound to respect, obey and make effective those commitments. The preamble of the Charter specifically provides that ‘armed forces shall not be used, save in common interest’, the latter comprehending the basic purposes of the organization of the United Nations, such as ‘promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”

I refer to the above controversy among members of the Supreme Court under the prewar Constitution (1935) in *Tubb* to illustrate the extent of confusion over the use of the Incorporation Clause in both *direct* (application of an international legal norm, e.g. the waiver of jurisdiction over foreign troops granted free passage) and *indirect* (judicial reference to foreign sources, e.g. foreign court decisions and writings of international law publicists vis-à-vis UN Charter obligations) senses, dating all the way back to the initial textualization of the Incorporation Clause.

In order to clarify the Incorporation Clause as intended by the framers since the 1935 Constitution (when the Clause was initially textualized) to the present (universalist) 1987 Constitution, it is important to look to the origins of the Clause and relate them to the 1986 Constitutional Commission’s universalist aspirations. To reiterate, the initial phraseology of the Incorporation Clause in the 1935 Constitution was drawn from section 4 of the German Constitution and section 7 of the Spanish Constitution. The framers intended the Incorporation Clause to ensure that the Philippine legal system would “enforce within its jurisdiction the generally accepted principles of international law”.<sup>124</sup>

Section 4 of the German (Weimar) Constitution stated that “[t]he universally recognized rules of international law are valid as being constituent parts of the German Federal law.”<sup>125</sup> ‘Generally recognized rules’ under this constitutional provision have been interpreted to refer to international law rules that “had been recognized by Germany”.<sup>126</sup> As intended under the provision, these ‘generally recognized rules’ do not require any legislative enactment before they were given effect.<sup>127</sup> In various cases decided under the German (Weimar) Constitution, Section 4 has been invoked to make international law an independent source of

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<sup>124</sup> Id.

<sup>125</sup> L. ERADES, INTERACTIONS BETWEEN INTERNATIONAL AND MUNICIPAL LAW: A COMPARATIVE CASE LAW STUDY, (1993 ed., T.M.C. Asser Instituut – The Hague), at p. 585.

<sup>126</sup> Id., at pp. 586 and 605, citing *The Gold Tax Case* (1921), decided by the Reichsfinanzhof. Judge Erades states, however, that this ruling “has never been repeated”.

<sup>127</sup> Id., at pp. 586-589.

legal obligation within the municipal sphere,<sup>128</sup> thus prohibiting domestic legislatures from unilaterally abrogating international conventions.<sup>129</sup> The comparable provisions that maintain the intent to incorporate 'generally recognized rules of international law' without need for legislative enactment in the present German Constitution are Articles 25 and 100 of the 8 May 1949 Basic Law of the Federal Republic of Germany, to wit:

"Article 25. The general rules of public international law are an integral part of federal law. They shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the federal territory.

Article 100. (1) If a court considers unconstitutional a law the validity of which is relevant to its decision, the proceedings shall be stayed, and a decision shall be obtained from the Land court competent for constitutional disputes if the matter concerns the violation of the Constitution of a Land, or from the Federal Constitutional Court if the matter concerns a violation of this Basic Law. This shall also apply if the matter concerned the violation of the Basic Law by Land law or the incompatibility of a Land law with a federal law.

*(2) If, in the course of litigation, doubt exists whether a rule of public international law is an integral part of federal law and whether such rule directly creates rights and duties for the individual (Article 25), the court shall obtain the decision of the Federal Constitutional Court.*

(3) If the constitutional court of a Land, in interpreting the Basic Law, intends to deviate from a decision of the Federal Constitutional Court or of the constitutional court of another Land, it must obtain the decision of the Federal Constitutional Court; if, in interpreting other federal law, it intends to deviate from the Supreme Federal Court or a higher federal court, it must obtain the decision of the Supreme Federal Court."<sup>130</sup>

The above Article 25 of the Basic Law does not limit the courts solely to Germany's recognition of the general rules of public international law, as the German Constitutional Court has affirmed the existence of such rules from the recognition 'by the great majority of States, not necessarily including the Federal

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<sup>128</sup> Id., at p. 586, citing *In Re Diplomatic Immunities (German Foreign Office) Case* decided by the Oberlandesgericht Darmstadt on 20 December 1926.

<sup>129</sup> Id., at p. 587, citing *In Re Ciarletto*, decided by the Reichsgericht on 18 January 1932.

<sup>130</sup> Id. at p. 589. Emphasis supplied.

German Republic'.<sup>131</sup> Both Section 4 of the German (Weimar) Constitution and Article 25 of the (present) Basic Law of the Federal Republic of Germany appear to entrust the task of recognition of the generally accepted principle of international law more to the judiciary than any other branch of government. In declaring a norm to be a 'generally recognized rule of international law' as contemplated in Section 4 of the German (Weimar) Constitution, German courts have referred to various factors, such as among others, (German) state practice in relation to the norm, relevant treaty instruments and conventions and corresponding interpretation in international practice, and German court decisions.<sup>132</sup>

Section 7 of the Spanish (1931) Constitution, on the other hand, stated that "the state will respect the universal rules of international law and will incorporate them into the positive law".<sup>133</sup> This provision has been described as one among various constitutional provisions that express the Spanish people's "appreciation of its international obligations and to her role in international affairs", similar in content to Section 4 of the German (Weimar) Constitution, Article 9 of the Austrian Constitution of 1920, and Article 4 of the Estonian Constitution of 1920.<sup>134</sup> Similar to the concerns of the framers of the 1935 Philippine Constitution in drafting the Incorporation Clause, these analogous provisions were likewise motivated by interest in ensuring independence and 'preservation of the family of nations' through the recognition and enforcement of international law. As in the case of Section 4 of the German (Weimar) Constitution, the task of recognizing what has been 'incorporated' in the Spanish municipal legal system (under Section 7 of the 1931 Spanish Constitution as a 'generally accepted rule' or 'universal rule' of international law) belongs more to the judiciary than any other branch of government.

Considering the foregoing history and constitutional practice from antecedent foreign sources of the Incorporation Clause alongside the stated intent of the framers of the 1935 Constitution (where the Incorporation Clause was first textualized), we elicit the following key points in considering the application of the constitutional norm in the Philippines:

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<sup>131</sup> Id., at p. 605, citing *Claim Against the Empire in Iran Case*, decided by the Bundesverfassungsgericht on 30 April 1963.

<sup>132</sup> Id., citing among others *The Ice King*, decided by the Reichsgericht on 10 December 1921; *In Re Afghan Minister (Consular Activities) Case*, decided by the Kammergericht on 13 October 1932; *Aliens (Non-Discrimination Clause) Case* decided by the Reichsfinanzhof on 24 November 1931.

<sup>133</sup> Hudson, Manley O., "The Spanish Constitution of 1931", 26 Am. J. Int'l L.3, (July 1932), pp. 579-582. Notably, Section 10(2) of the present (1978) Spanish Constitution states that "[p]rovisions relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain". See English translation of the full text of the Spanish Constitution of 1978 at [http://www.senado.es/constitu\\_i/index.html](http://www.senado.es/constitu_i/index.html) (last visited 28 May 2008).

<sup>134</sup> Id. at p. 579. See Pergler, Charles, "Constitutional Recognition of International Law", 30 Virg. L. Rev. 2, (March 1944), pp. 326-327.



***Embedded international legal norms.*** There are international legal norms that are already present in the Philippine legal system without having been codified by Congress. The Incorporation Clause was intended to admit the presence of international legal norms *without need of legislative enactment*.

***Qualified status of the ‘incorporated’ international legal norm.*** Not all international legal norms are deemed incorporated in the Philippine legal system. The kind of international legal norms that would be admitted are only those that are *generally accepted principles*, or such norms as are ‘necessary to the preservation of the family of nations’.

***Judiciary as gatekeepers of incorporation.*** The judiciary is entrusted with *the primary task of recognition*, or discovering what international legal norms have already been incorporated in the Philippine constitutional system. This does not, however, mean that there is no role for the executive or the legislative branch in relation to the Incorporation Clause. Executive and legislative acts should conform with such generally accepted principles of international law, and may be reversed, annulled, or modified by the judiciary where they are violative of, or inconsistent with, the incorporated international legal norm.

The foregoing observations are important in the context of the universalist-designed 1987 Philippine Constitution, which, as previously discussed, textualizes many universalist norms and embodies universalist aspirations. It should be stressed that the Incorporation Clause under the 1987 Constitution emphasizes more universalist language, when it qualifies the “adopt[ion of] generally accepted principles of international law as part of the law of the land” with adherence to “the policy of peace, equality, justice, freedom, cooperation, and amity with all nations”. Considering the expanded power of judicial review under the 1987 Constitution, the judiciary should therefore be seen as having a wider critical role as ‘gatekeepers of incorporation’ of generally accepted principles of international law.

## CONCLUSION

The sensitive, careful, and rigorous use of international law in Philippine judicial constitutional practice is thus a return to the ideological origins of the 1987 Constitution. A universalist reading of the 1987 Constitution, however, does not mean that we uncritically replace colonial or dictatorship rule with a new form of imposed rule through ‘international supremacy’. The universalist design, orientation, and philosophy of the 1987 Constitution provides for the system of entry of international law norms as well as corresponding checking mechanisms for qualifying such entry. As I have tried to show throughout this work, the 1986

Constitutional Commissioners did lay down the framework for judicial recognition of international law in the contours of the 1987 Constitution. Judicial recognition is by no means a clerical process for automatic admission of international law norms. Thus, not every norm in international law stands in isolation as a “universalist” norm that could be deemed to have constitutional status in the Philippines; neither did the framers of the postcolonial and post-dictatorship 1987 Constitution intend a blanket or uncritical acceptance of international law. ‘Universalism’ is not a new form of colonialism or dictatorship, but rather, the ideology of fundamental human dignity values spoken in the pluralism of legal norms and sources of normativity.

Reading universalism into the 1987 Constitution does not mean that we are purposely weakening the Philippines as a nation-state, or that we are authorizing the rule of a mob of individualists in the Philippine democracy. Harnessing universalism in our constitutional canon simply encourages us towards more openness in public reasoning, by making use of hitherto-neglected discursive paths in the continuing scrutiny of how our governmental institutions indeed function and wield power within Philippine public order. When we can more clearly identify and describe the actual contours of Philippine public order, we are in a far better position to critically test the *legality* of an assertion of executive power in opposition to constitutional right both from institutional and individual perspectives. In this sense, the genuine scope of executive power could be traced from the *nature* of the power as well as its *interaction* with individual right. We expose the mode of rationality that informs executive policy in the extent to which it conforms with, or deviates from, the Filipino people’s fundamental human dignity values as expressed and incorporated in the rights, strictures, and policies of the 1987 Constitution. The broad and detailed manifold of universalism in the 1987 Constitution emphasizes to us that there are, and have long been, “*governing dynamics*” to the relationship between public power and private right in Philippine democracy. With the increasing demand for synchronicity between Philippine governmental conduct and international law in the years to come, the Aegean task now for the Philippine judiciary is to consciously acknowledge its constitutionally-appointed responsibilities as the ‘mediator’, ‘filter’, and ‘political gatekeeper’ of international law in the Philippine constitutional system. Our courts can give full meaning to these mediating, filtering, and gatekeeping roles when they finally unravel the governing dynamics of freedom and constraint --- taking in the liberal, internationalist, and universalist normative space that our constitutional framers envisioned from the very beginning.